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CASE NUMBER:

IN THE
SUPREME COURT OF THE UNITED STATES

IMPERIAL MERCHANT SERVICES, INC., a California corporation, doing business as CHECK RECOVERY SYSTEMS,

Petitioner,

-vs-

BRANDY G. HUNT, ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Ninth Circuit affirmed the order of the District Court requiring a class action defendant to advance the class notice costs prior to entry of a final judgment. This order requires the Defendant to finance the cost of the Plaintiffs' litigation, even if the Defendant ultimately prevails. This order violates the precedent established by this Court in *Eisen vs. Carlisle & Jacquelin*, (1974), 417 U.S. 156, 177-178, 94 S. Ct. 2140, 2152-2153 and *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 98 S. Ct. 2380 (1978) that all class notification costs are initially the responsibility of the plaintiff.

The three questions presented are:

1. In an appeal under *Eisen vs. Carlisle & Jacquelin*, (1974), 417 U.S. 156, 177-178, 94 S. Ct. 2140, 2152-2153, does the appellate court have jurisdiction to review the class certification order and underlying liability issues for error or is its jurisdiction limited to a review of the notice cost order for abuse of discretion.

2. When there is no established precedent to determine liability, can the defendant be ordered to pay the class notice costs prior to the entry of a final judgment.

3. Is payment of the cost of sending the class notices the obligation of the plaintiff, or can the District Court shift the obligation to the defendant prior to the entry of a final judgment when the plaintiff is unable to pay the class notice costs?

LIST OF PARTIES

All of the parties below are listed in the caption. In addition, The National Consumer Law Center, The Impact Fund, Public Citizen, Public Advocates, Inc., and Asian Pacific Legal Center appeared as *amicus curiae* in support of Respondent.

CORPORATE DISCLOSURE STATEMENT

Plaintiff IMPERIAL MERCHANT SERVICES, INC., a California corporation, doing business as CHECK RECOVERY SYSTEMS, sometimes hereinafter referred to as "IMS", does not have a parent corporation and does not have any publicly held corporation that owns any of its stock.

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OPINION BELOW

The initial opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Brandy Hunt, on behalf of herself and others similarly situated; Brian Castillo vs. Imperial Merchant Services, Inc., dba Check Recovery Systems,* reported at 560 F. 3d 1137. *See* Appendix A.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. 1254(1). The opinion of the Ninth Circuit was rendered on March 31, 2009.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

RULE 23, FEDERAL RULES OF CIVIL PROCEDURE

23. Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) Certification Order.

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) Notice.

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable

under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) Judgment. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) Particular Issues. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) Subclasses. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) In General. In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require–to protect class members and fairly conduct the action–giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed

accordingly; or

(E) deal with similar procedural matters.

(2) Combining and Amending Orders. An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 10 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing

order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) Standard for Appointing Class Counsel. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) Interim Counsel. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) Duty of Class Counsel. Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

RULE 54, FEDERAL RULES OF CIVIL PROCEDURE

Rule 54. Judgment; Costs

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment should not include recitals of pleadings, a master's report, or a record of prior proceedings.

(b) Judgment on Multiple Claims or Involving Multiple Parties. When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

(c) Demand for Judgment; Relief to Be Granted. A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

(d) Costs; Attorney's Fees.

(1) Costs Other Than Attorney's Fees. Unless a federal statute, these rules, or a court order provides otherwise, costs--other than attorney's fees--should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 1 day's notice. On motion served within the next 5 days, the court may review the clerk's action.

(2) Attorney's Fees.

(A) Claim to Be by Motion. A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.

(B) Timing and Contents of the Motion. Unless a statute or a court order provides otherwise, the motion must:

(i) be filed no later than 14 days after the entry of judgment;

(ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award;
(iii) state the amount sought or provide a fair estimate of it; and
(iv) disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.

(C) Proceedings. Subject to Rule 23(h), the court must, on a party's request, give an opportunity for adversary submissions on the motion in accordance with Rule 43(c) or 78. The court may decide issues of liability for fees before receiving submissions on the value of services. The court must find the facts and state its conclusions of law as provided in Rule 52(a).

(D) Special Procedures by Local Rule; Reference to a Master or a Magistrate Judge. By local rule, the court may establish special procedures to resolve fee-related issues without extensive evidentiary hearings. Also, the court may refer issues concerning the value of services to a special master under Rule 53 without regard to the limitations of

Rule 53(a)(1), and may refer a motion for attorney's fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.
(E) Exceptions. Subparagraphs (A)-(D) do not apply to claims for fees and expenses as sanctions for violating these rules or as sanctions under 28 U.S.C. § 1927.

STATEMENT OF THE CASE

This Petition asks this Court to intervene in the practice developed in the District Courts and approved by the Ninth Circuit of ordering a defendant to finance the plaintiff's cost of litigation by forcing the defendant to pay substantial class notification costs prior to the entry of a final judgment against the defendant. This practice violates the precedent established by this Court in the case of *Eisen vs. Carlisle & Jacquelin*, (1974), 417 U.S. 156, 177-178, 94 S. Ct. 2140, 2152-2153 and *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 98 S. Ct. 2380 (1978).

The facts in this case are undisputed.

HUNT purchased goods, wares, and merchandise for $137.15, and paid for them with a dishonored check. HUNT then filed for bankruptcy. HUNT then filed a class action in United States District Court against IMS for violating the Federal Fair Debt Collection Practices Act (hereinafter referred to as "F.D.C.P.A."). The F.D.C.P.A. case was based

solely on the argument that the recipient of a dishonored check may not impose *both* the returned check charge permitted by *Civil Code Section* 1719 *and* prejudgment interest under *Civil Code Section* 3287. There is no established precedent on this issue (*Imperial Merchant Services, Inc., a California corporation, doing business as Check Recovery Systems vs. Brandy G. Hunt*, 528 F. 3d 1129, 1130)

IMS then timely filed a Complaint in the Bankruptcy Case of HUNT seeking a fraud judgment based on the underlying debt for a dishonored check and HUNTs' bank records that proved Plaintiff wrote 47 consecutive N.S.F. checks over a two month period without making even one single deposit to her account to cover the checks she was writing!

A.

THE BANKRUPTCY CASE APPEAL

The Bankruptcy Court granted the IMS Motion for Summary Judgment and found HUNT was liable for fraud. However, the Bankruptcy Court refused to award IMS both the returned check charge permitted by *California Civil Code Section* 1719 and interest under *California Civil Code Section* 3287 as damages. IMS appealed the portion of the judgment denying IMS interest under *California Civil Code Section* 3287 to the Ninth Circuit as 9th Circuit Case Number 07-15976. The Ninth Circuit referred the question of liability to the California Supreme Court, which accepted the referral as California Supreme Court Case Number S 163577. This case is hereafter referred to as THE BANKRUPTCY

CASE APPEAL. The BANKRUPTCY CASE APPEAL has now been briefed before the California Supreme Court and oral arguments were heard on May 28, 2009. The California Supreme Court will make a final resolution in THE BANKRUPTCY CASE APPEAL and establish binding precedent to determine whether the recipient of a dishonored check may charge the dishonored check writer *both* interest under *California Civil Code Section* 3287 and a returned check charge under *California Civil Code Section* 1719. HUNT's theory of liability in the F.D.C.P.A. case will also be resolved by the BANKRUPTCY CASE APPEAL now pending before the California Supreme Court as Case Number S 163577 and as 9th Circuit Case Number 07-15976.

B.
THE FEDERAL FAIR DEBT COLLECTION PRACTICES ACT CASE

The District Court also granted a partial summary judgment to HUNT on the class action she filed under the Federal Fair Debt Collection Practices Act (hereinafter referred to as the "F.D.C.P.A."); certified one sub-class consisting of those proposed class members who did not pay any interest under F.R.C.P. Rule 23(b)(2); and certified another sub-class consisting of those proposed class members who actually did pay interest under F.R.C.P. Rule 23(b)(3) . While the liability issue was being resolved by the appellate courts in the BANKRUPTCY CASE APPEAL, HUNT filed a motion in the F.D.C.P.A. case to require IMS to pay the costs of notifying the members of the class. The District Court granted HUNT's motion to require IMS to pay the cost of

producing and sending the notices to the class members certified under Rule 23(b)(3). IMS filed this appeal of the order requiring IMS to pay the costs of notifying the members of the class under the authority of *Eisen vs. Carlisle & Jacquelin*, (1974), 417 U.S. 156, 177-178, 94 S. Ct. 2140, 2152-2153. The opinion issued by the Ninth Circuit Court of Appeal in this *Eisen* appeal is the subject of this Petition for Writ of Certiorari and is hereinafter referred to as the CLASS NOTICE ORDER APPEAL.

The Ninth Circuit set oral argument on the CLASS NOTICE ORDER APPEAL while the BANKRUPTCY CASE APPEAL was before the California Supreme Court. The Ninth Circuit published its opinion in the CLASS NOTICE ORDER APPEAL on March 31, 2009 before the California Supreme Court could rule on liability.

REASONS FOR ALLOWANCE OF THE WRIT

The CLASS NOTICE ORDER APPEAL challenges the practice developed by class action attorneys of requiring a defendant to finance the plaintiff's cost of litigation by requiring defendants to advance substantial costs to notify class members prior to a determination of final liability. The defendant has no effective remedy to recover those costs if it ultimately prevails in the litigation and is eventually found not to be liable to the plaintiff or if the Class Certification Order is eventually found to be wrong.

The Ninth Circuit engaged in the following rationalization to disregard this compelling argument. It held:

> **"IMS asserts that it will be unable to recollect notice costs from Hunt if**

> **IMS prevails on its merits appeal because Hunt has filed for bankruptcy. It argues that the district court's decision risks permanently depriving IMS of the notice cost amount, even of the outcome of the merits appeal entitles IMS to recover the notice costs it pays. This argument, however, overlooks the likelihood that had notice costs been placed on Hunt, Hunt might have had equal difficulty collecting from IMS if she prevailed in the merits appeal."**
>
> ***Brandy Hunt, on behalf of herself and others similarly situated; Brian Castillo vs. Imperial Merchant Services, Inc., dba Check Recovery Systems,*** **reported at 560 F. 3d 1137, 1144**

The Ninth Circuit refused to acknowledge that class notice costs are advanced by the attorneys for the class, not the named class plaintiff, even though the obligation to pay those costs is the obligation of the plaintiff. If the plaintiff, or rather the plaintiff's attorneys, are unable or unwilling to pay the notice costs, the class action is not supposed to proceed (*Eisen vs. Carlisle & Jacquelin*, (1974), 417 U.S. 156, 177-178, 94 S. Ct. 2140, 2152-2153). There is no justification to transfer the obligation to pay the notice costs from the plaintiff to the defendant because the plaintiff is unable to pay the notice costs.

The class action industry is often operated as a legal extortion operation by plaintiff class

action attorneys. In this case, HUNT's attorneys used the class action procedure to extort hundreds of thousands of dollars in settlements from other debt collectors on a theory of liability that was completely unsupported by any binding legal precedent. When your Petitioner decided to litigate this case to obtain binding precedent that would establish the validity or lack thereof of the theory advanced by HUNT's attorneys, HUNT's attorneys placed every procedural roadblock they could to avoid appellate review. Seeking the class notice order was only one of many efforts of the attorneys for HUNT used to avoid appellate review, and it illustrates why class action notice costs must be the obligation of the plaintiff until final judgment is entered as has been stated by this Court on many prior occasions.

In this case, the average potential award to class members is under $5.00 per member. The cost of complying with the class notice order, which Defendant will never be able to recover from Bankrupt Plaintiff Brandy Hunt, is almost as much as the Defendants' potential liability. Therefore, the Ninth Circuit Class Notice Order has the legal effect of making the Defendant a loser even if it ultimately prevails in the litigation.

The class action industry is already profitable enough. If an attorney or the client believes there is a valid class action case, the attorney or the client can advance the costs of notifying the class. If the attorney or the client does not believe in the class action case sufficiently to be willing to advance these costs, the class action cannot be allowed to proceed. The deep pockets of a defendant should never be utilized to finance the class notice costs, or any of

the plaintiff's cost of litigation, in advance of the entry of a final judgment.

Review by this Court is required to establish uniformity in a practice that seldom reaches appellate review. As the Ninth Circuit observed:

> **"Even if it is assumed that we have discretion to dismiss this case as "anticipatorily moot," we decline to do so because this case gives us an opportunity to decide an issue that often arises in district courts but typically evades appellate review. So far as we are aware, no appellate court has addressed in a published opinion whether a district court's determination that a class action defendant is liable on the merits entitles the district court to shift notice costs to that defendant. This absence of authority is not surprising. Because the losing party in a class action typically is responsible for class notice costs, there is no need for an appellate court reviewing a final merits judgment also to review a notice cost order that is based on a party's liability. Even when a party is able to appeal an interlocutory notice cost order that is based on a liability determination, by the time the case is adjudicated the district court may have calculated damages and issued a final judgment, rendering the notice cost issue moot. Nonetheless, in cases where liability is disputed on**

appeal or where there is a considerable lag between the notice cost order and a final judgment, the imposition of notice costs could be a significant burden on a party, one it could not always recoup if it later prevails on liability in its appeal. Here, IMS has argued that it cannot afford to continue operations and pay the class notice costs. There may also be cases where absent the shifting of notice costs upon determination of summary judgment liability, plaintiffs would have difficulty funding notice costs if the class is extremely numerous. It is perhaps not an easy question, but having considered all these circumstances we hold that we may consider an interlocutory appeal of an order shifting class notice costs, even if the issue may likely become moot at some time in the near future. We therefore proceed to assess the merits of the order shifting class notice costs."

Brandy Hunt, on behalf of herself and others similarly situated; Brian Castillo vs. Imperial Merchant Services, Inc., dba Check Recovery Systems, **reported at 560 F. 3d 1137, 1142 - 1143**

District Courts throughout the nation are ordering defendants to finance the plaintiff's cost of litigation by requiring defendants to pay the

class notice costs. This Court has always stated that class notice costs are not the obligation of the plaintiff. This Court must grant this Petition for Writ of Certiorari to establish nationwide standards and rules for the transfer of class notice costs to defendants that the District Courts will have to follow.

I
REVIEW IS WARRANTED TO ESTABLISH WHETHER THE APPELLATE COURT IN AN *EISEN* APPEAL HAS JURISDICTION TO REVIEW THE CLASS CERTIFICATION ORDER OR TO MERELY REVIEW THE NOTICE COST ORDER FOR ABUSE OF DISCRETION

A
EFFECT OF F.R.C.P. RULE 23(f)

Defendant did not seek permission to seek interlocutory appellate review of the Class Certification Order under F.R.C.P. Rule 23(f).

After the time for Defendant to seek interlocutory review of the class certification order expired, Plaintiff moved to require Defendant to pay the notice costs. Unlike the review under F.R.C.P. Rule 23(f), review of the order requiring Defendant to pay the notice costs can be appealed without permission. Defendant timely sought appellate review of the class notice order.

When Plaintiff obtained an order from the District Court that required Defendant to pay the notice costs, Plaintiff created a right of appeal that did not *previously* exist. The right to appeal

under the *Eisen* case exists *in addition to, AND NOT INSTEAD OF*, the permissive appeal provided for by F.R.C.P. Rule 23(f). A permissive appeal provided for in F.R.C.P. Rule 23(f) is *NOT* available in *every* case; an appeal as a matter of right is only available in cases where the District Court has ordered the defendant to pay the notice costs in advance of a final judgment.

In the CLASS NOTICE ORDER APPEAL, the Ninth Circuit found it had no jurisdiction to review the class certification order in an *Eisen* appeal, and it therefore refused to review the Class Certification Order in the appeal that is the subject of this Petition for Writ of Certiorari. The Ninth Circuit found that F.R.C.P. Rule 23(f) established the exclusive procedure for review of the class certification issues prior to entry of a final judgment.

This published opinion of the Ninth Circuit renders the creation of the right to appellate review of the Class Notice Order created by the United States Supreme Court under *Eisen* meaningless! If the appellate court cannot consider all of the class certification action issues, as well as the eventual liability of the defendant, in an *Eisen* appeal, the defendant is denied an effective appellate review of a class notice order. An appeal of the order that defendant pay the class notice costs must necessarily include any issue that would establish that the District Court was wrong to order the defendant to pay the class notice costs. Improper certification of the class is the major factor that would establish that the District Court was wrong. Any interpretation that deprives defendant of the ability to seek appellate review of the class certification order,

as well as underlying liability, to establish that the District Court was wrong has the legal effect of denying the defendant an effective appellate review of the class notice order and rendering the *Eisen* appeal meaningless.

The legal authorities cited by the Ninth Circuit in support of this argument are not applicable. In *Plata v. Davis*, 329 F. 3d 1101, 1107 (9th Cir., 2003) the plaintiff sought to appeal an order denying certification of a class by classifying it as a request for an injunction. This Court found no jurisdiction to hear the appeal because the order appealed from was not an appealable order. This case has no bearing on this case because the *Eisen* case has *already* established that this is an appealable order.

The Ninth Circuit also cited precedents permitting an interlocutory appeal of a class certification order when it was "inextricably bound up" in a class wide injunction appealable under 28 *United States Code* 1292(a)(i) even though the defendant did not comply with F.R.C.P. Rule 23(f).

The distinction drawn by the Ninth Circuit between an appeal of a class wide injunction and a class notice order is completely illogical and invalid. Once the class notice order is before the appellate court, the appellate court must have jurisdiction to consider *any* reason the class notice order is wrong. Certainly, the class certification order, as well as underlying liability, are key issues that must be raised before a defendant can be deprived of substantial amounts of money to pay the class notice costs.

Since F.R.C.P. Rule 23(f) is not the jurisdictional basis for this appeal, Defendant should not be required to satisfy the criteria to

establish Rule 23(f) jurisdiction. An *Eisen* appeal should include, at a minimum, review of the class certification order, as well as the finding of liability by the District Court. Whether or not the Court of Appeal would also have jurisdiction under F.R.C.P. Rule 23(f) should be of no consequence because the Court of Appeal was vested with jurisdiction to hear this appeal by *Eisen*.

Now that the Ninth Circuit has published its opinion in this case, this Court must grant review to provide class action defendants with the ability to obtain the effective review of a notice cost order this court intended that the *Eisen* decision to provide.

II
REVIEW IS WARRANTED TO ESTABLISH THAT A DEFENDANT CANNOT BE ORDERED TO PAY THE CLASS NOTICE COSTS PRIOR TO THE FINAL DETERMINATION OF LIABILITY IF THERE IS NO ESTABLISHED PRECEDENT TO DETERMINE LIABILITY

A.
NOTICE COSTS ARE THE OBLIGATION OF PLAINTIFF UNTIL THE ENTRY OF A FINAL JUDGMENT

> "We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be

maintained as a class action. Indeed, such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it. He is thereby allowed to obtain a determination on the merits of the claims advanced on behalf of the class without any assurance that a class action may be maintained. This procedure is directly contrary to the command of subdivision (c)(1) that the court determine whether a suit denominated a class action may be maintained as such '(a)s soon as practicable after the commencement of (the) action....' In short, we agree with Judge Wisdom's conclusion in Miller v. Mackey International, 452 F.2d 424 (CA5 1971), where the court rejected a preliminary inquiry into the merits of a proposed class action: 'In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.' Id., at 427.

Additionally, we might note that a preliminary determination of the merits may result in substantial prejudice to a defendant, since of necessity it is not accompanied by the traditional rules and procedures

applicable to civil trials. The court's tentative findings, made in the absence of established safeguards, may color the subsequent proceedings and place an unfair burden on the defendant.

In the absence of any support under Rule 23, petitioner's effort to impose the cost of notice on respondents must fail. *The usual rule is that a plaintiff must initially bear the cost of notice to the class.* The exceptions cited by the District Court related to situations where a fiduciary duty pre-existed between the plaintiff and defendant, as in a shareholder derivative suit. Where, as here, the relationship between the parties is truly adversary, *the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit.*

Petitioner has consistently maintained, however, that he will not bear the cost of notice under subdivision (c)(2) to members of the class as defined in his original complaint. See 479 F.2d, at 1008; 52 F.R.D., at 269. We therefore remand the cause with instructions to dismiss the class action as so defined.

***Eisen vs. Carlisle & Jacquelin*, (1974), 417 U.S. 156, 177-178, 94 S. Ct. 2140, 2152-2153**

The United States Supreme Court held that, in a true adversary proceeding, *F.R.C.P. Rule 23 requires that the costs of notice be paid by plaintiff.* The United States Supreme Court made no exception to this rule if liability was established. The United States Supreme Court went on to rule that if plaintiff does not pay the costs, the portion of the class action requiring notice must be dismissed.

There is NO binding precedent from ANY Circuit Court of Appeal, other than the opinion published in this case by the Ninth Circuit, that supports ordering a defendant to pay notice costs *before final* liability has been established.

There is NO binding precedent from ANY Circuit Court of Appeal, other than the opinion published in this case by the Ninth Circuit, that hold that the inability of a plaintiff to pay the class notice order costs constitutes a reason to shift that burden to the defendant.

While several District Court decisions imposed costs after the District Court established liability, the decision imposing liability was based on a *final resolution* of the underlying facts by the District Court. None of the cases involved an interpretation of the law by the District Court with *no binding precedent* to guide it in determining liability. This distinction is particularly important in this case because Defendant has maintained from the very beginning of this case that it wanted appellate review on the liability issue to establish binding precedent.

For example, in the case of *Six Mexican Workers vs. Arizona Citrus Growers*, (1986), 641 F. Supp 259, the District Court found that the defendants intentionally violated the Farm Labor

Contractor Registration Act, a factual finding. Defendants did not claim the law did not apply or that the District Court had misinterpreted it. Defendants sole defense was a factual dispute that their actions did not violate the law. Defendants then conceded that the finding of facts by the trial court effectively resolved all the liability issues.

In the case of *Kyriazi vs. Western Electric Co.*, (1979), 465 F. Supp 1141, the District Court found that defendant discriminated against its female employees and applicants for employment, a factual finding. Defendants did not claim the law did not apply or that the District Court had misinterpreted it. Defendants sole defense was a factual dispute that their actions did not violate the law. Defendants then conceded that the finding of facts by the District Court did effectively resolved all the liability issues.

In the case of *Meadows vs. Ford Motor Co.*, (1973), 62 F.R.D. 98, the District Court found that defendant had discriminated against its female employees and applicants for employment, a factual finding. Defendants did not claim the law did not apply or that the District Court had misinterpreted it. Defendants sole defense was a factual dispute that their actions did not violate the law. Defendants then conceded that the finding of facts by the trial court effectively resolved all the liability issues.

This is a very important distinction. The standard of review on an appeal of factual findings is whether the trier of fact engaged in a clear abuse of discretion. The standard of review on an appeal of an issue of law is a *de novo* review. The appellate court does not defer to the

lower court's ruling, but *independently considers the matter anew*, as if no decision had been rendered on the matter below (*Voight v. Savell*, 70 F. 3d 1552, 1564, (9th Cir., 1995)). Thus, the likelihood that an appellant will prevail on an appeal of a determination of law is significantly greater than the likelihood that an appellant will prevail on an appeal of a determination of an issue of fact *because the latitude of review* by the appellate court *is much greater* when the appeal is based on a legal issue.

There are *NO issues of fact* in the BANKRUPTCY CASE APPEAL, and it will be based *solely* on the *determination of an issue of law*. The BANKRUPTCY CASE APPEAL will create binding precedent and determine final liability in the F.D.C.P.A. case. Final liability *cannot be established* for the purposes of imposing liability for F.R.C.P. Rule 23(b)(3) notice costs in this case *until the issue of law has been determined* in the BANKRUPTCY CASE APPEAL.

From the outset, Defendant has sought to obtain binding precedent through Appellate Review on the interest issue, the sole basis for liability. Defendant asked for Appellate Review at every stage of these proceedings. Plaintiff consistently sought to delay Appellate Review. Plaintiff sought the order imposing notice costs on Defendant as part of her effort force Defendant to settle the case and avoid Appellate Review. Compelling a settlement to avoid Appellate Review is not a proper reason to order Defendant to pay for the costs of the class notice in advance of a *final* determination of liability.

Ordinarily, the costs of complying with the Class Notice Order are the obligation of the plaintiff, and are awarded against a defendant as costs in the District Court judgment. If the defendant wishes to appeal and stay payment of the judgment or execution on the judgment, the defendant merely posts a bond. If the defendant is successful on appeal, defendant pays none of plaintiff's costs. If the plaintiff is successful on appeal, plaintiff recovers either from the defendant or the bond. Regardless of the final result, both plaintiff and defendant are *guaranteed* an effective and meaningful appellate review. The order of the Ninth Circuit in this case deprives the defendant of the opportunity for a meaningful and effective review of both the Class Certification Order and the imposition of liability.

If Plaintiff wanted to avoid interlocutory appellate review, Plaintiff did not have to seek an interim order requiring the Defendant to pay Plaintiffs' Class Notice Costs. Once the Plaintiff obtained an order requiring the Defendant to pay the Plaintiffs' Class Notice Costs, the Plaintiff created a right, under *Eisen*, to obtain an interlocutory review of both the Class Certification Order and underlying liability in the case.

Since final liability will not be established in this case until a ruling is issued in BANKRUPTCY CASE APPEAL, Defendant should not be ordered to pay the notice costs now. The notice costs must either be paid by Plaintiff or the portion of the class action requiring the issuance of a notice must be dismissed.

III
REVIEW IS WARRANTED TO ESTABLISH THAT THE COST OF SENDING CLASS NOTICES IS THE OBLIGATION OF PLAINTIFF AND CANNOT BE SHIFTED TO THE DEFENDANT PRIOR TO THE ENTRY OF A FINAL JUDGMENT

A.
IT IS UNFAIR AND UNCONSCIONABLE TO ORDER A DEFENDANT TO PAY THE NOTICE COSTS BEFORE FINAL LIABILITY IS ESTABLISHED IN A CASE

In the event Defendant succeeds on the BANKRUPTCY CASE APPEAL or an appeal of the Class Certification Order in the F.D.C.P.A. case that is the subject of this Petition for Writ of Certiorari, Defendant would have no way to recover the cost of class notification from Bankrupt Plaintiff BRANDY G. HUNT. This is why the costs of issuing the class notices must be the obligation of Plaintiff *until* final liability is established by an appellate court in the BANKRUPTCY CASE APPEAL and in an ultimate appeal of the Class Certification Order.

This is also why the District Court had no jurisdiction under *Eisen vs. Carlisle & Jacquelin*, (1974), 417 U.S. 156, 177-178, 94 S. Ct. 2140, 2152-2153 to order the Defendant to pay the notice costs now. Obviously, Bankrupt Plaintiff HUNT would have no ability or desire to reimburse Defendant for the mailing costs if Defendant prevails on appeal. This is why the United States Supreme Court held in *Eisen vs. Carlisle &*

Jacquelin, (1974), 417 U.S. 156, 177-178, 94 S. Ct. 2140, 2152-2153 that the *costs of notifying the class members are a cost that must be borne by the Plaintiff.* While a judgment entered in favor of Plaintiff would include the costs incurred in notifying the members of the class as an element of damages, there is no reason to enter a separate order requiring a defendant to pay the cost of notifying the class members *in advance of the entry of a Final Judgment.*

The order of the District Court and the Ninth Circuit requiring Defendant to pay the entire notice cost in advance of a Final Judgment must be reversed.

B.
ABUSE OF DISCRETION

In the case of *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 98 S. Ct. 2380 (1978), this Court was faced with the need to manually search defendant's records to identify the list of potential class records at a cost of $16,000.00. The District Court ordered that *Oppenheimer Fund, Inc.* pay for the cost of preparing the list, and the United States Supreme Court reversed and ordered the Plaintiff to reimburse *Oppenheimer Fund* for the cost of the record search for the following reasons:

> "The second reason advanced by the District Court was that $16,000 is a "relatively modest" sum, presumably in comparison to the Fund's total assets, which exceed $500 million. Although in some circumstances the ability of a party to bear a burden

> **may be a consideration, the test in this respect normally should be whether the cost is substantial; not whether it is "modest" in relation to ability to pay. In the context of a lawsuit in which the defendants deny all liability, the imposition on them of a threshold expense of $16,000 to enable the plaintiffs to identify their own class hardly can be viewed as an insubstantial burden. Cf. Eisen IV, supra, at 176, 94 S. Ct., at 2151. As the expenditure would benefit only respondents, we think that the amount of money involved here would cut strongly against the District Court's holding, even if the principle of Nissan did not control."**
>
> ***Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 361 - 362, 98 S. Ct. 2380, 2395 (1978)**

In the *Oppenheimer Fund* case, the United States Supreme Court refused to impose a cost of $16,000.00 on a defendant that was worth hundreds of millions of dollars, stating "*the test in this respect normally should be whether the cost is substantial*". The costs that the District Court seeks to impose on this impoverished defendant are just as substantial as the costs that *Oppenheimer Fund* was relieved of by the United States Supreme Court. The order of the District Court is an abuse of discretion under the rationale of *Oppenheimer* because the amount of costs that the Defendant was ordered to pay are *substantial*. In addition, in *Oppenheimer*, the

Plaintiff was *always* ordered to pay for the cost of mailing the notice to the class members.

C.
IT IS INEQUITABLE, UNFAIR, AND UNCONSCIONABLE TO ORDER THE DEFENDANT TO PAY THE NOTICE COSTS BEFORE THE APPEALS COURT DETERMINES THE LIABILITY OF DEFENDANT

If Defendant is ordered to advance class notice costs and eventually prevails on appeal, Defendant will be left with no remedy to recover the funds it advanced for mailing. Certainly Plaintiff, who has not yet paid the *fraud* judgment already issued against her by the Bankruptcy Court, will not be able or willing to reimburse Defendant for these costs.

This is why the District Court had no jurisdiction under *Eisen* to order the Defendant to pay the notice costs now. Obviously, *Bankrupt* Plaintiff HUNT would have no ability or desire to reimburse Defendant for the mailing costs if Defendant prevails on appeal. This is the reason the United States Supreme Court held in *Eisen* that *the costs of notifying the class members are a cost that must be borne by the Plaintiff.* Since a judgment entered in favor of a plaintiff would include the costs incurred in notifying the members of the class as an element of damages, there is no reason to enter a separate order requiring a defendant to pay the cost of notifying the class members *in advance of the entry of a Final Judgment.*

D.
ATTORNEY FEES MUST BE TREATED DIFFERENTLY THAN COURT COSTS

Amicus Curiae suggested to the Ninth Circuit that an order for an advanced payment of court costs should be treated the same as an order for an advanced attorney fees.

At the outset, there is a marked difference between these two expenses. An order for the advanced payment of attorney fees is an order that requires a payment of fees to the attorney. In the event the case is later resolved in favor of the defendant, the defendant will have effective recourse to recoup any advanced fees from the attorney.

However, an order for the advanced payment of court costs is an order that requires the payment of money *to the plaintiff*, *NOT* an order that requires a payment of money to the attorney for the plaintiff. Therefore, in the event the case is later resolved in favor of the defendant, the defendant has absolutely no recourse against the named plaintiff. This creates an additional reason not to permit an interim order as the Court of Appeal for the Fifth Circuit observed in the following passage from *Ruiz v. Estelle,* 609 F.2d 118 (5th Cir., 1980) :

> **"We need not consider whether or not the award would be appealable if the defendant had alleged and proved that the mere payment of the fees would make them unrecoverable. In that situation the order at issue might be both conclusive and unreviewable as a practical matter, whatever might be**

> **the legal theory, and, in consequence, the appellants might be in danger of irreparable harm. See 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure s 3911, at 477 (1976). The defendants have made no such suggestion here. Furthermore, counsel for plaintiffs stated unequivocally during oral argument that, should the fees awarded be paid and should the court later decide that all or part of the amount paid was not due, the appropriate amount would be refunded. He offered to provide a bond as security for performance of this undertaking."**
>
> ***Ruiz v. Estelle,* 609 F.2d 118, 119 - 120 (5th Cir., 1980)**

In the case of *Rosenfeld v. U.S.,* 859 F.2d 717 (9th Cir., 1988), the Ninth Circuit Court recognized this distinction in the following portion of the opinion:

> **"If (but for this appeal) the fees would have been disbursed to the lawyers rather than retained by the prisoners and defendants, the problem would be less serious ... we assume that the district court has an inherent power to order attorneys to whom fees were paid over by their clients pursuant to court order to repay the fees should the order be reversed."**

Rosenfeld v. U.S., 859 F.2d 717, 721 (9th Cir., 1988)

The argument of Amicus Curiae that an interim order requiring a class action defendant to pay the class notice costs is treated the same as an interim order requiring the defendant to pay interim attorney fees is completely unsupported by the cases. An interim payment of attorney fees can be recouped from the attorneys, while an interim payment of class notice costs is an obligation of the plaintiff, as opposed to her attorneys, that cannot be recouped from the attorneys *or the plaintiff*.

***Eisen* specifically authorized appellate review of a order requiring a class action defendant to pay class notice costs. The same authorization of appellate review of an interim order for the payment of attorney fees is not available.**

IV
CONCLUSION

The Order of the Ninth Circuit that Defendant pay the costs of issuing the class notices prior to the final determination of liability must be reversed and remanded to the Ninth Circuit because:

1. An appeal under *Eisen vs. Carlisle & Jacquelin*, (1974), 417 U.S. 156, 177-178, 94 S. Ct. 2140, 2152-2153, requires the appellate court to review the class certification order and underlying liability if these issues are raised by the Appellant.

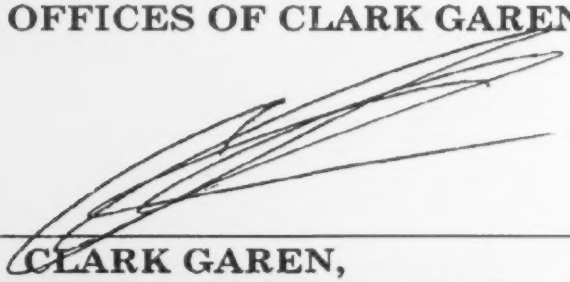
2. Defendant cannot be ordered to pay the class notice costs prior to the final determination of liability when there is no legal precedent to establish liability.

3. Payment of the cost of sending the class notices is the obligation of the Plaintiff and cannot be shifted by the District Court to the Defendant prior to the entry of a final judgment.

Dated: JUNE 4, 2009

LAW OFFICES OF CLARK GAREN

BY



CLARK GAREN,
ATTORNEY FOR PETITIONER
IMPERIAL MERCHANT SERVICES, INC.,
a California corporation, doing business as
CHECK RECOVERY SYSTEMS,

FOR PUBLICATION
UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

No. 07-16418.
D.C. NO. CV-05-04993-MJJ
OPINION

Brandy HUNT, on behalf of herself and others similarly situated; Brian Castillo,

Plaintiffs-Appellees,

v.

IMPERIAL MERCHANT SERVICES, INC., dba Check Recovery Systems, Inc.,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of California
Martin J. Jenkins, District Judge, Presiding

Argued and Submitted
Feb. 13, 2009 - San Francisco, California

Filed March 31, 2009.

Before: WILLIAM C. CANBY, JR., RONALD M. GOULD, and JAY S. BYBEE, Circuit Judges.

Opinion by Judge Gould

SUMMARY

CIVIL LITIGATION AND PROCEDURE/CLASS ACTIONS

The court of appeals affirmed a judgment of the district court. The court held that a district court has the discretion to require a class action defendant to pay the costs of class notification, when the court has already determined that the defendant is liable on the merits.

Appellee Brandy Hunt filed a class action complaint against appellee Imperial Merchant Services, Inc. in district court in California, alleging that it violated the Fair Debt Collection Practices act (FDCPA), 15 U.S.C. § 1692 *et seq.*, by attempting to collect both an interest charge and a statutory service charge on dishonored checks. The district court granted Hunt partial summary judgment on liability, concluding that IMS's collection efforts violated California law and thus the FDCPA. In a separate order issued the same day, it certified two subclasses, with Hunt named as plaintiff. Approximnately five months later, the district court ordered IMS to pay the cost of mailing notice to the subclass members.

IMS appealed the order requiring it to pay notice costs, though it devoted much of its briefing to arguments that the class certification should be overturned. As a condition for a stay of the order, IMS was required to post a $9,000 bond representing the costs of notifying the class. Also pending was IMS's appeal of the district court's judgment affirming an earlier bankruptcy court decision involving Hunt and the same subject matter (the merits appeal).

[1] Class certification orders generally are not immediately appealable, but appellate courts have discretion to permit interlocutory appeals of class certification orders. Here, however, the general rule applied, because IMS attempted to piggyback its class certification appeal onto a notice cost order affecting only the parties, not onto an injunction affecting every class member. [2] Under the collateral order doctrine, the Ninth Circuit had jurisdiction to consider the order placing class notice costs on IMS.

[3] The mootness doctrine asks the basic question whether decision of a once living dispute continues to be justified by a sufficient prospect that the decision will have an impact on the parties. [4] Here, any decision on the merit appeal might make this appeal moot, because presumably the parties would no longer dispute which side should pay the notice costs. [5] Even accepting that this appeal might become moot once the merits appeal was decided, this appeal was not moot now, and the Ninth Circuit had jurisdiction to review the class notice cost order. Moreover, because of the bond posted by IMS as a condition of the stay on the notice cost order pending this appeal, there was a sufficient prospect that the Ninth Circuit decision would have an impact on the parties. [6] "Anticipatorily moot" appeals, such as the present appeal, might permissibly be dismissed on a doctrine of "prudential mootness," but a live controversy need not be dismissed as moot merely became it might become moot in the near future. [7] The Ninth Circuit declined to dismiss the present appeal as anticipatorily moot, even assuming that it possessed the power to do so, because the appeal involved an issue that often arose in district courts, but typically evaded appellate review, i.e. whether a district court's determination that a class action defendant is liable on the merits entitles the

district court to shift notice costs to that defendant.

[8] the usual rule is that a plaintiff must initially bear the cost of notice to the class. However, occasionally the district court has some discretion in allocating the cost of complying with an order concerning class notification. [9] Although the Ninth Circuit has never addressed when it is appropriate to place notice costs on a class action defendant, many district courts have placed notice costs on the class action defendant, once the defendant's liability has been established. [10] There is no reason to suspend a district court's authority to shift notice costs based on a liability determination until after the time period for an appeal on liability has expired. [11] A Ninth circuit decision recognizing a district court's power to shift interim costs to a defendant in the attorney fee context, even when the defendant might later prevail on the underlying merits question and be entitled to reimbursement, does not affect the power of a district court in an appropriate case to shift notice costs to a defendant, even if the defendant might later be entitled to recover tose costs.

[12] The distirct court's decision shifting costs to IMS was not an abuse of discretion. While IMS's claim that, if it won the merit appeal, it would be unable to recover from Hunt because of her bankruptcy was somewhat speculative, IMS told the district court that it would be unable to pay the notice costs. The judgment of the district court had to be affirmed.

COUNSEL

Paul S. Arons, Law Office of Paul Arons, Friday harbor, Washington, and O. Randolph Bragg, Horowitz , Horowitz & Associates, Chicago, Illinois for the plaintiffs-appellees.

Clark Garen, Law Offices of Clark Garen, Palm Springs, California, for the defendant-appellant.

OPINION

GOULD, Circuit Judge:

Class action defendant Imperial Merchant Services, Inc. ("IMS") appeals the district court's interlocutory order requiring it to pay the costs of notifying the plaintiff class. The class action alleges that IMS' debt collection practices violated the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. The district court certified a plaintiff class, granted partial summary judgment for the plaintiffs on their Fair Debt Collection Practices Act ("FDCPA") claim, and then ordered IMS to pay the costs of notifying class members because the summary judgment order established that IMS was liable on the merits. We have jurisdiction to review the notice cost order under the collateral order doctrine of 28 U.S.C. § 1291. We affirm the order and hold that a district court has the discretion to require a class action defendant to pay the costs of class notification when the court has already determined that the defendant is liable on the merits.

I

This appeal reaches us in unusual procedural circumstances that have resulted in two active appeals assigned to different panels of our circuit. Brandy Hunt and Brian Castillo (collectively "Hunt") filed a class action complaint against IMS, alleging that it violated the FDCPA by attempting to collect both an interest charge and a statutory service charge on dishonored checks. The district court concluded that whether IMS violated the FDCPA turned on whether California law permits a debt collector to demand both a statutory service charge and interest in addition to the debt amount. Hunt v. Check Recovery Sys., Inc., 478 F.Supp.2d 1157, 1161 (N.D.Cal.2007). The district court granted Hunt partial summary judgment on liability in March 2007, concluding that IMS' collection efforts violated California law and thus the FDCPA. In a separate order filed the same day, the district court certified two subclasses under Federal Rules of Civil Procedure ("Rule") 23(b)(2) and 23(b)(3), with Hunt and Castillo as named plaintiffs.

On August 1, 2007, the district court ordered IMS to pay the cost of mailing notice to the Rule 23(b)(3) subclass members. The district court's decision relied on its partial summary judgment order that established IMS' liability on the merits. IMS timely appealed the order requiring it to pay notice costs, though it devoted much of its briefing to arguments that the class certification should be overturned.

The plaintiffs then at their own expense notified the class members. The district court granted IMS' motion for a stay of its order requiring IMS to reimburse the named plaintiffs for those notice costs. As a condition of the stay, IMS was required to post a $9,000 bond representing the costs of notifying the class. The stay is in effect for the duration of this

appeal.

The class action was not the first time Brandy Hunt had pursued her FDCPA claim against IMS. Hunt had declared bankruptcy before filing her class action complaint, and the bankruptcy court determined that IMS could not collect both an interest charge and a statutory service charge from Hunt under California law. IMS appealed the bankruptcy court's decision to the district court, and the appeal was assigned to the same district judge responsible for the consolidated class action cases. The district court affirmed the bankruptcy court's decision, incorporating its March 2007 partial summary judgment order in this class action case as the basis for affirming. IMS appealed the district court's judgment affirming the bankruptcy court, and the appeal was assigned to a different panel of our circuit as case number 07-15976 (the "merits appeal"). On May 12, 2008, the other panel certified to the California Supreme Court the question whether a debt collector recovering on a dishonored check may impose both a service charge and prejudgment interest under California law. Imperial Merchant Servs., Inc. v. Hunt, 528 F.3d 1129, 1130 (9th Cir.2008).

The California Supreme Court granted certification in July 2008, but has not yet issued its decision, and so the merits appeal is still active. The class action case has been stayed since June 2008, pending resolution of both this appeal and the merits appeal.

II

We review de novo whether a district court has authority to issue an order and review for an abuse of discretion the district court's exercise of that authority. See, e.g., Idaho Watersheds Project v. Hahn, 307 F.3d 815, 823 (9th Cir.2002) ("A district court's authority to grant an injunction is reviewed de novo, but the court's

exercise of that power is reviewed for an abuse of discretion."); United States ex rel. Newsham v. Lockheed Missiles & Space Co., Inc., 190 F.3d 963, 968 (9th Cir.1999) ("The district court's denial of costs is reviewed for an abuse of discretion. Whether the district court has the authority to award costs, however, is a question of law reviewed de novo.") (citation omitted). We agree with the parties that de novo review is appropriate to the extent that IMS challenges the district court's legal power to impose class notice costs on a defendant when the district court's separate judgment on liability forms the basis for that decision and is still under appellate review. If we conclude that the district court has this authority, then we will review for abuse of discretion its decision to shift class notice costs. See Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 359, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978) (reversing an order shifting class notice costs because "the District Court abused its discretion in requiring petitioners to bear the expense of identifying class members").

III

A

IMS asks us to overturn the district court's class certification and notice cost orders, while Hunt contends that we lack jurisdiction to review either order. We review questions of our own jurisdiction de novo. Sandoval-Lua v. Gonzales, 499 F.3d 1121, 1126 (9th Cir.2007). We conclude that we lack jurisdiction to review the class certification order but that we may review the notice cost order.

[1]"Class certification orders generally are not immediately appealable." Plata v. Davis, 329 F.3d 1101, 1106 (9th Cir.2003). We have discretion to permit interlocutory appeals of class certification orders under Rule 23(f), but IMS concedes it has not met the Rule's procedural requirements. Instead, IMS contends, without citing precedent, that by issuing the notice cost order the district court gave IMS a right to appeal the class certification order because IMS must be able to argue any issue that would establish that the notice cost order was incorrect. We have occasionally permitted appeals on class certification orders when they are "inextricably bound up" with a class-wide injunction appealable under 28 U.S.C. § 1292(a)(1), even if the appellant did not comply with Rule 23(f). See Bates v. United Parcel Serv., Inc., 465 F.3d 1069, 1075-76 & n. 5 (9th Cir.2006); Paige v. California, 102 F.3d 1035, 1039-40 (9th Cir.1996). Here, however, IMS attempts to piggyback its class certification appeal onto a notice cost order affecting only the parties, not an injunction affecting every class member. Cf. Cunningham v. Gates, 229 F.3d 1271, 1284 (9th Cir.2000) ("We have consistently interpreted 'inextricably intertwined' very narrowly."). We reject IMS' argument that a district court's order shifting notice costs creates appellate jurisdiction over its earlier class certification order, and we conclude that we lack jurisdiction to review IMS' objections to class certification.

[2] In Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 171-72, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974), the Supreme Court held that a district court's order imposing most of the class notice costs on the defendants was immediately appealable under the

collateral order doctrine.FN1 We see no meaningful distinction between this case and Eisen for jurisdictional purposes and hold that the collateral order doctrine gives us jurisdiction under 28 U.S.C. § 1291 to consider an order placing class notice costs on a defendant. See S. Ute Indian Tribe v. Amoco Prod. Co., 2 F.3d 1023, 1027-28 (10th Cir.1993) (relying on Eisen to hold that jurisdiction existed to review order requiring parties to split class notice costs); In re Victor Techs. Sec. Litig., 792 F.2d 862, 863-64 (9th Cir.1986) (relying in part on Eisen in holding that the collateral order doctrine establishes appellate jurisdiction over an interlocutory order requiring a class action plaintiff to reimburse a third party for costs incurred during class notification).

[3] Eisen does not end our jurisdictional inquiry. It is possible that the notice cost issue will become moot once the merits appeal is decided. "The mootness doctrine asks the basic question whether decision of a once living dispute continues to be justified by a sufficient prospect that the decision will have an impact on the parties." Flagstaff Med. Ctr., Inc. v. Sullivan, 962 F.2d 879, 884 (9th Cir.1992) (internal quotation omitted). At oral argument both parties

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FN1. The collateral order doctrine states that an interlocutory order may be appealed under 28 U.S.C. § 1291 if it "finally determine[s] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Englert v. MacDonell, 551 F.3d 1099, 1103 (9th Cir.2009) (quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949)).

argued that this case is not moot, "a factor that weighs in favor of our jurisdiction because a party moving for dismissal on mootness grounds bears a heavy burden." Demery v. Arpaio, 378 F.3d 1020, 1025 (9th Cir.2004) (internal quotation omitted). "Nonetheless, we have an independent duty to consider sua sponte whether a case is moot, and we consider this issue de novo." Id. (internal citation omitted).

[4] IMS concedes that it must pay the class notice costs if it loses the merits appeal. Conversely, Hunt likely would be responsible for notice costs if the merits appeal is decided in IMS' favor, because the basis for the district court's ruling was that IMS was liable on the merits. Consequently, any decision by the merits appeal might make this appeal moot because presumably the parties would no longer dispute which side should pay the notice costs. FN2 See Abdala v. INS, 488 F.3d 1061, 1063 (9th Cir.2007) (stating that case can become moot "[a]t any stage of the proceeding"); 13A Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 3533.10 (3d ed.1998) (citing "basic rule that a case must remain alive throughout the course of appellate review"); but see Gator.com Corp. v. L.L. Bean, Inc., 398 F.3d 1125, 1132 (9th Cir.2005) (en banc) (" 'To abandon the case at an advanced stage may prove more wasteful than frugal,'

FN2. Our reasoning does not imply that this case necessarily would become moot if the merits appeal were already decided. There might still be jurisdiction under one of the "numerous exceptions to mootness" articulated by the Supreme Court. Gator.com Corp. v. L.L. Bean, Inc., 398 F.3d 1125, 1141 (9th Cir.2005) (en banc) (W. Fletcher, J., dissenting).

and a flexible application of the mootness doctrine may therefore be appropriate." (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 191-92, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000))).

[5] But even accepting that this appeal might become moot once the merits appeal is decided, that has not yet happened. We conclude that this appeal is not moot now and that we may review the notice cost order. As a condition of the stay on the notice cost order pending this appeal, IMS has posted a supersedeas bond to the district court covering the notice costs. Had we decided in IMS' favor, then the district court would have released the bond to IMS, which would reduce its costs and exposure. On the other hand, our holding affirming the district court ensures that Hunt will be reimbursed for the notice costs that Hunt has already paid, an amount now secured by the supersedeas bond. We conclude that there is a "sufficient prospect that [our] decision will have an impact on the parties" and decline to dismiss this appeal on mootness grounds. Flagstaff Med. Ctr., 962 F.2d at 884.

[6] This appeal, while not moot in a classical sense, may be characterized as being "anticipatorily moot" because an impending decision in the merits appeal might eliminate the controversy between the parties. Perhaps some cases that are "anticipatorily moot" might permissibly be dismissed under a doctrine of "prudential mootness," adopted by some of our sister circuits, under which a court can dismiss an appeal not technically moot if "circumstances [have] changed since the beginning of litigation that forestall any occasion for meaningful relief." S. Utah Wilderness Alliance v. Smith, 110 F.3d 724, 727 (10th Cir.1997); see also Chamber of Commerce v. Dep't of Energy, 627 F.2d 289, 291 (D.C.Cir.1980) ("In some circumstances, a controversy, not actually moot, is so attenuated that

considerations of prudence and comity for coordinate branches of government counsel the court to stay its hand, and to withhold relief it has the power to grant."). However, we are not required to dismiss a live controversy as moot merely because it may become moot in the near future.

[7] Even if it is assumed that we have discretion to dismiss this case as "anticipatorily moot," we decline to do so because this case gives us an opportunity to decide an issue that often arises in district courts but typically evades appellate review. So far as we are aware, no appellate court has addressed in a published opinion whether a district court's determination that a class action defendant is liable on the merits entitles the district court to shift notice costs to that defendant. This absence of authority is not surprising. Because the losing party in a class action typically is responsible for class notice costs, there is no need for an appellate court reviewing a final merits judgment also to review a notice cost order that is based on a party's liability. Even when a party is able to appeal an interlocutory notice cost order that is based on a liability determination, by the time the case is adjudicated the district court may have calculated damages and issued a final judgment, rendering the notice cost issue moot. Nonetheless, in cases where liability is disputed on appeal or where there is a considerable lag between the notice cost order and a final judgment, the imposition of notice costs could be a significant burden on a party, one it could not always recoup if it later prevails on liability in its appeal. Here, IMS has argued that it cannot afford to continue operations and pay the class notice costs. There may also be cases where absent the shifting of notice costs upon determination of summary judgment liability, plaintiffs would have difficulty funding notice costs if the class is extremely numerous.

It is perhaps not an easy question, but having considered all these circumstances we hold that we may consider an interlocutory appeal of an order shifting class notice costs, even if the issue may likely become moot at some time in the near future. We therefore proceed to assess the merits of the order shifting class notice costs.

B

[8] "The usual rule is that a plaintiff must initially bear the cost of notice to the class." Eisen, 417 U.S. at 178, 94 S.Ct. 2140. "[C]ourts must not stray too far from the principle underlying [Eisen] that the representative plaintiff should bear all costs relating to the sending of notice because it is he who seeks to maintain the suit as a class action." Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 359, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978). However, occasionally "the district court has some discretion" in allocating the cost of complying with an order concerning class notification. Id. at 350.

[9] We have never addressed when it is appropriate to place notice costs on a class action defendant. However, many district courts have placed notice costs on the class action defendant once the defendant's liability has been established. See, e.g., Macarz v. Transworld Sys., Inc., 201 F.R.D. 54, 58 (D.Conn.2001) (agreeing with the plaintiff that "because liability has already been determined, defendant bears the cost of notice to the class"); Six (6) Mexican Workers v. Ariz. Citrus Growers, 641 F.Supp. 259, 264 (D.Ariz.1986) (directing defendants to pay notice costs in part because "liability of the defendants will have already been established"); Catlett v. Missouri Highway and Transp. Comm'n, 589 F.Supp. 949, 952 (D.Mo.1984) (shifting notice costs "because the liability of the [defendant] has been established").

These district court decisions point us towards recognizing, as commentators have suggested, a general principle that "interim litigation costs, including class notice costs, may be shifted to defendant after plaintiff's showing of some success on the merits, whether by preliminary injunction, partial summary judgment, or other procedure." 3 William B. Rubenstein, Alba Conte, and Herbert B. Newberg, Newberg on Class Actions § 8:6 (4th ed.2007).

[10] IMS contends that the district court had no power to shift notice costs because "final liability" on the underlying merits action was still on appeal to this court. It argues that the prior district court cases shifting notice costs are inapposite because in none of them did a district court shift notice costs while liability was still contested on appeal. Even if IMS' interpretation of these cases is correct, we see no reason to suspend a district court's authority to shift notice costs based on a liability determination until after the time period for an appeal on liability has expired. Also, we have recognized a district court's power to shift interim costs to a defendant in the attorney fee context, even when the defendant might later prevail on the underlying merits question and be entitled to reimbursement. See Rosenfeld v. United States, 859 F.2d 717, 720 (9th Cir.1988) (holding that interim attorney fee award was unreviewable even though "upon completion of the district court proceedings, the government could recover the interim fees it paid out if it successfully appealed the [merits issue], which formed the limited basis of the interim fee award").

[11] IMS concedes that district courts may award interim attorney fees but argues that these cases are distinguishable because it is easier to recollect fees from an attorney than from a plaintiff. But this

argument implicates a district court's discretion in awarding interim fees, not its inherent power to do so. Although in Rosenfeld we implied we might be more willing to review an interlocutory fee award if those fees were paid to a hard-to-reach plaintiff rather than to counsel, we never indicated that the recipient of the attorney fees would impact the district court's inherent authority to grant the award. See id. at 721. We hold that a district court in an appropriate case may award interim costs to a plaintiff by shifting class notice costs to a defendant even if the defendant might later be entitled to recover those costs.

[12] We next address whether the district court's decision shifting costs to IMS here was an abuse of discretion. IMS asserts that it will be unable to recollect notice costs from Hunt if IMS prevails on its merits appeal because Hunt has filed for bankruptcy. It argues that the district court's decision risks permanently depriving IMS of the notice cost amount, even if the outcome of the merits appeal entitles IMS to recover the notice costs it pays. This argument, however, overlooks the likelihood that had notice costs been placed on Hunt, Hunt might have had equal difficulty collecting from IMS if she prevailed in the merits appeal. While IMS' claim that it would be unable to recover from Hunt is somewhat speculative, IMS told the district court that it would be unable to pay the notice costs. IMS has not shown that its potential collection problems so outweigh those it conceded Hunt would face that the district court abused its discretion by forcing IMS to pay the notice costs. We hold that once the district court determined that IMS was liable on the merits, it had the discretion to shift the notice costs to IMS. Stated another way, the district court had discretion to choose not to impose on Hunt the burden of first advancing notice costs and

then trying to recover those costs from IMS after a final judgment. We perceive no solution here that can avoid risk to both parties, and accordingly we think the proper placement of notice costs is best left to the sound discretion of district courts, once liability on the merits has been determined in the first instance. In such circumstances, the district courts are not required in all cases to shift notice costs but instead may consider the totality of circumstances to decide whether shifting notice costs is just in that particular case.

IV

District courts may order a class action defendant to pay the cost of class notification after they determine that the defendant is liable on the merits. They may in an appropriate case shift these notice costs even when the liability decision is under appeal. Here, considering the totality of circumstances, we conclude that the district court did not abuse its discretion by placing the cost of class notification on IMS.

AFFIRMED.

(2)

Supreme Court, U.S.
FILED

081558 JUN 3 - 2009

OFFICE OF THE CLERK

CASE NUMBER:

IN THE
SUPREME COURT OF THE UNITED STATES

IMPERIAL MERCHANT SERVICES, INC.,
a California corporation, doing business as
CHECK RECOVERY SYSTEMS,

Petitioner,

-vs-

BRANDY G. HUNT, ON BEHALF OF HERSELF
AND OTHERS SIMILARLY SITUATED

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI SUPPLEMENTAL APPENDIX B AND APPENDIX C CONTAINING DISTRICT COURT OPINIONS

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

HUNT,

Plaintiff,

v.

CHECK RECOVERY SYSTEMS, INC.,

Defendant.
_____/

No. C05-04993 MJJ
ORDER MODIFYING CLASS CERTIFICATION
AND GRANTING PLAINTIFF'S MOTION
FOR APPROVAL OF CLASS NOTICE PLAN

INTRODUCTION

Before the Court is Plaintiffs Brandy Hunt and Brian Castillo's (Plaintiffs") Motion for Approval of Class Notice Plan. FN1 ("Notice Motion"). Defendant Imperial Merchant Service, dba Check Recovery Systems ("Defendant') opposes the motion. Also before the Court is Plaintiff's Motion for Clarification or Modification of Class Certification Order. FN2 (Modification Motion"). Defendant does not oppose this motion.

For the following reasons, the Court **GRANTS** Plaintiffs' Motion for Approval of Class Notice Plan

1. Docket No. 94
2. Docket No. 97

and **MODIFIES** the class certification as set forth below.

FACTUAL BACKGROUND

Plaintiffs Hunt and Castillo filed their complaints on December 5, 2005 and March 16, 2006, respectively. On May 9, 2006, this Court issued a Related Case Order relating Plaintiffs' cases. Plaintiffs seek declaratory judgment, damages and costs based on Defendant's violation of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et. seq.* ("FDCPA"). Plaintiffs alleged that Defendants violated the FDCPA by attempting to collect an interest charge in addition to the check amount and a statutory service charge.

March 20, 2007, the Court issued an order denying Defendant's motion for summary judgment and granting in part Plaintiffs' motion for summary judgment ("Summary Judgment Order"). In that order, the Court agreed with Plaintiffs that Defendant's collection letters violated the FDCPA because they demanded interest as well as the amount of the check and the statutorily authorized service charge, which violated 15 U.S.C. §§ 1682e(2)(A) and 1692f(1). The Court granted Plaintiff's motion for summary judgment as to Defendant's liability under those sections.

Also on March 20, 2007, by separate order, the Court granted Plaintiffs' motion to certify class ("Certification Order"). The class comprises all persons to whom Defendant mailed a collection demand at any time since December 5, 2004, (1) which included a demand for both interest and a statutory service charge on a dishonored check; (2) where the check was written in the State of California for personal, family, or household purposes; and (3) whose mail was not returned as

undeliverable. (Certification Order, p. 14.) The Court further certified, under rule 23(b)(2), "issues of liability, declaratory relief, and statutory damages under the FDCPA for those class members who did not pay any portion of the *statutory service charge*." (*Id.*) (emphasis added.) In addition, the Court certified under Rule 23(b)(3) "the issues of actual damages under the FDCPA for those class members who paid any portion of the *statutory service charge* demanded." (*Id.*) (Emphasis added.)

Taken together, Plaintiffs' motions constitute a request that the Court modify the definition of the class and approve Plaintiff's notice to that class. Because the extent of the class will determine the nature of the notice, the Court will first analyze Plaintiffs' Motion for Clarification or Modification of Class Certification Order and will then turn to their Motion for Approval of Class Notice Plan.

LEGAL STANDARD

A. Modification of Class Certification

Rule 23 of the Federal Rules of Civil Procedure governs class actions in federal court. The rule requires a court to determine "at an early practicable time" whether the action merits class certification. Fed.R.Civ.P. 23(c)(1)(A). The order certifying the class must "define the class and the class claims, issues, or defenses. . .". Fed.R.Civ.P. 23(c)(1)(B). In addition, a court can divide a class into subclasses and treat each subclass as a class. Fed.R.Civ.P. 23(c)(4). The Court has discretion to alter or amend the certification order "before final judgment." Fed.R.Civ.P. 23(c)(1)(C).

B. Approval of Class Notice Plan

"For any class certified under Rule 23(b)(1) or (2), the court *may* direct appropriate notice to the class." Fed.R.Civ.P. 23(c)(2)(A)(emphasis added). On

the other hand, when a court certifies a class under 23(b)(3), the court "must" direct to class members "the best notice practicable under the circumstances." Fed.R.Civ.P. 23(c)(2)(B). The best practicable notice should include "individual notice to all members who can be identified through reasonable effort." *Id.*

In addition to requiring notice, the rules also dictate the style and substance of the notice. The notice must "concisely and clearly state in plain, easily understood language" several elements. *Id.* These include "the nature of the action, the definition of the class certified, the class claims, issue, or defenses, that a class member may enter an appearance through counsel if the member so desires, that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and the binding effect of a class judgment on class members under rule 23(c)(3)." *Id.*

ANALYSIS

A. Modification of Class Certification

The court, in its class certification order, created two subclasses of Plaintiffs. These subclasses are complementary. Each member of the class is in exactly one of the subclasses since each class member either "paid any portion of the statutory service charge," or did not. (Certification Order, p. 14.)

The Court certified under 23(b)(2) issues of liability, declaratory relief, and statutory damages for those who did not pay any service charge. The Court certified under Rule 23(b)(3) issues of actual damages for those that paid any portion of the service charge. Plaintiffs do not want to change the extent of the class overall, but rather move for a modification of the allocation of class members between subclasses. This allocation implicates the

procedures for treating the subclasses.

Rule 23(b)(2) is appropriate when "the party opposing the class has acted ... on grounds generally applicable to the class, thereby making appropriate final injunctive relief or *corresponding declaratory relief* with respect to the class as a whole." Fed. R.Civ.P. 23(b)(2)(emphasis added). A Rule 23(b)(2) class action seeks to secure remedies "with respect to the class as a whole." the rule mentions both "injunctive relief or corresponding declaratory relief." *Id.* However, class actions certified under Rule 23(b)(2) are not limited to actions requesting only injunctive and declaratory relief; these cases may

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3. More specifically, FDCPA class actions certified under Rule 23(b)(2) are also not limited to actions requesting injunctive and declaratory relief. *Ballard v. Equifax Check Services, Inc.*, 186 F.R.D. 589, 596-97 (E.D. Cal. 1999)(certifying FDCPA class under Rule 23(b)(2) on the issues of liability, declaratory relief, and statutory damages but reserving certification of actual damages for certification under Rule 23(b)(3)); *Gonsalves v. Arrow Fin. Services, L.L.C.*, (S.D. Cal. 2006)(certifying FDCPA class under Rule 23(b)(2) where plaintiffs received standardized demand letters and sought declaratory relief and statutory damages; *Borcherding-Dittloff v. Transworld Sys., Inc.*, 185 F.R.D. 558, 565-66 (certifying class under Rule 23(b)(2) for claims under FDCPA where plaintiffs sought declaratory relief and statutory damages); *Gammon v. GC Services Ltd. P'ship*, 162 F.R.D. 313, 319-22 (1995)(certifying class under Rule 23(b)(2) for claims under FDCPA seeking declaratory relief and statutory damages); *Swanson v. Mid Am, Inc.*, 186 F.R.D. 665 (M.D. Fla. 1999)(same).

also seek monetary damages where the money damages are "merely incidental". *Probe v. State Teachers' Retirement Sys.*, 780 F.2d 776, 780 (9th Cir. 1986), Cert. Denied, 476 U.S. 1170 (1986). "Incidental" means that the monetary damages "flow directly from liability to the class as a whole on the claims forming the basis of the ...declaratory relief." *Swanson v. Mid am, Inc.*, 186 F.R.D. 665 (M.D. Fla 1999)(citing *Alison v. Citgo Petroleum Corp.*, 151 F. 3d 402, 413, (5th Cir. 1998) FN3. The focus on a remedy that imposes liability on defendant for conduct generally applicable to the class makes the offer to class members of the opportunity to opt out of the lawsuit inappropriate. This lack of opt-out opportunity prevents a class member from opting out and bringing a separate lawsuit for declaratory judgment, whose result would either be redundant or contradictory. Additionally, the FRCP makes direction of notice in a 23(b)(2) class discretionary. Fed.R.Civ.P. 23(c)(2)(A).

In class action suits where damages predominate, on the other hand, courts certify the class under Rule 23(b)(3). *See* Fed.R.Civ.P. 23(b). When a court certifies a class or subclass under this section, it *must* direct notice of the action, including the opportunity to class members. Fed.R.Civ.P. 23(c)(2)(B).

Plaintiff urges the Court to modify the class certification order to avoid overbreadth in the definition of the subclass certified under Rule 23(b)(3). Because the Court must direct notice to each member of this subclass, including an offer to opt-out, overbreadth would lead to the unnecessary cost of sending notice to "thousands of check writers who are not entitled to actual damages."(Modification Motion at p.4.) Only those class members who

suffered actual damages should receive notice or the opportunity to opt out.

After an analysis of legislature history, this Court found that the FDCPA is a "mandatory recovery scheme that does not provide for additional collection of *interest*." (Summary Judgment Order, p. 14.)(emphasis added.) The statutory charge, on the other hand, is not wrongful. *Id.*, In fact, imposition of a statutory fee is part of the "mandatory and exclusive" scheme that the legislature intended for recovery by bad debt collectors. *Id.* Every member of the class received Defendant's demand for interest payments in addition to statutory charges. However, only those Plaintiffs who paid any part of the demanded interest suffered actual damages as a result of Defendant's actions. Many of the class members who paid any portion of the *penalty* (who currently comprise the 23(b)(3) subclass) did not pay any portion of the demanded interest. FN4. Those who did not pay interest did not suffer actual damages.

B. APPROVAL OF CLASS NOTICE PLAN

1. BEST NOTICE PRACTICABLE

Plaintiffs propose sending notice to class

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4. Defendant only sought payment of: (1) the face amount of the check; (2) a statutory service charge; and (3) interest. Plaintiffs consider interest to be any amount of a class member's payment to Defendant that exceeds the check amount plus the service charge. (Memo. In Sup. Of Motion to Modify, p. 5, n.2.) Under this calculation method, the group of class members that paid any interest will necessarily be smaller than the group that paid any penalty.

members by first-class mail. Determining the scope of "best notice practicable" is a fact-intensive inquiry. *In re Simon II Litigation*, 211 F.R.D. 86, 183 (E.D.N.Y. 2002). Delivery by first-class mail can satisfy the best notice practicable when there is no indication that any of the class members cannot be identified through reasonable efforts. *See Bourias V. Davis Law Associates*, 237 F.R.D. 345, 356 (E.D.N.Y. 2006)(Delivery by first class mail to each individual class member satisfies Rule 32(c)(2)(b) when no indication that any of the class members cannot be identified through reasonable efforts.) The use of first-class mail is particularly appropriate for two reasons. First, the letters which give rise to the action reached class members through the mail. Second, membership in the class is predicated on the successful receipt of mail; only those people "whose mail was not returned as undeliverable" are part of the certified class. Delivery by first class mail satisfies the requirement for best notice practicable.

Having determined the mode of transmission, the court next turns to the form of the notice. Plaintiffs submitted, with their motion for approval of class notice, a proposed form of notice. The purpose of the mandatory notice requirement in 23(b)(3) actions is to present a fair recital of the subject matter of the suit and to inform all class members of their opportunity to be heard. *In Re Gypsum Antitrust Cases*, 565 F.2d 1123, 1125 (9th Cir. 1977)(citations omitted). The Court examines plaintiff's proposed notice for compliance with Rule 23(c)(2)(b) and for its protection of the due process interests of absent class members.

Plaintiffs' proposed notice includes a summary of the action, the plaintiffs, defendant, subject of the suit and a definition of the class certified. The notice

lays out Plaintiffs' claim and informs class members of their right to opt out of the suit, the ability to obtain separate representation, and some of the reasons to opt out of the suit. The language in the notice informs recipients that "[a]ll rulings made by the court will apply" to them and that they will share in any settlement. Accordingly, the operative language of the proposed notice satisfies Rule 23(c)(2)(b)'s elements and uses the necessary "plain, easily understood" language. The notice overall is clear and concise. FN5

The court approves plaintiffs' notice to 23(b)(3) subclass members.

2. Cost of notice

The court now turns to the allocation of the cost of providing notice to the class. According to defendant's data, 22,341 people paid interest in response to demand letters in the class time period. At $1 per person, the cost of providing notice would be $22,341. While this amount is less than 10% of the total interest payments that Defendant processed, it is not a trivial amount for either party.

Class representatives must be prepared, at the outset of the suit, to accept the responsibility of identifying absentee class members and paying for their individual notice. *See Eisen v. Carlisle & Jacqueline*, 417 U.S. at 156, 176-79 (1974). This general rule that imposes cost of notice on the party seeking to maintain a class action can give way in "peculiar circumstances." *In Re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1102 (5th Cir. 1977). At the end of the case, of course, the district

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5. The final notice should contain real contact information for class counsel instead of the placeholder present in the exhibit.

court can allocate the cost of identifying and giving notice to class members "as it would any other item of costs." *Id.*

In *Berland v. Mack*, 48 F.R.D. 121 (S.D.N.Y. 1969), the district court dealt with how to allocate the cost notice to the class. In that case, a consolidation of stockholders' actions based on fraud in the purchase of securities, the court noted that "no rigid rule as to allocation of expense of notice is advisable and that the better course is to decide the issue in each case on the basis of the relevant factors." *Id.* At 132. These factors include the merit of the claim and the defendant's desire to take advantage of the *res judicata* effect of the class action. *Id.* In addition, the *Berland* court considers the number of named plaintiffs and their financial responsibility, their interests compared with the entire class, and their ability to pay considering the cost of the notice. *Id.* Because factual underpinning of the present case differs from *Berland*, not all of the factor are applicable. Nevertheless, the *Berland* analysis provides a framework for the analysis here. The court now turns to the relevant *Berland* factors.

Under *Berland*, the strength of the class action claim is a factor for deciding which party pays the cost of the notice. When evaluating the strength of plaintiff's case on the merits, this court need not resort to a preliminary hearing or examine the apparent merit in the claim. *See Eisen* (rejecting the use of a preliminary hearing for determining which party should pay the cost of directing notice). Instead, the court refers to its March 20, 2007 Summary Judgment Order. In that order, the Court found that "as a matter of law ... Defendant's collection letters violated the FDCPA" and granted Plaintiff's Motion for Summary Judgment as to

Defendant's liability. (Summary Judgment Order, p. 17.) several district courts have shifted the cost of notice to the defendant after a finding of liability. *See Meadows v. Ford Motor Co.*, 62 F.R.D. 98 (W.D.Ky. 19873)(Imposing the expense of notice on defendant after determining that the plaintiff and the class were entitled to recover on their demands for injunctive relief); *Catlett v. Mo. Hwy. and Transp. Comm'n*, 589 F. Supp. 949 (W.D.Miss. 1984)(Ordering defendant to bear expense of notice because the liability had been established and because cost involved was substantial); *Kriazi v. Western Elec. Co.*, 465 F. Supp. 1141, 144 (D.M.J. 1979)(After a finding of liability, writing, "all costs of notification are, of course, to be borne by [defendant]"). In addition, a district court recently required a defendant to bear the cost of notice based on the *likelihood* that summary judgment would be entered against the defendant. *See Fournigault v. Independence One Mortg. Corp*, 2007 WL 1492848 (N.D. Ill. 2007). While defendant devotes considerable effort to distinguish the case law, the court does not find its arguments persuasive.

First, Defendant relies on *Eisen* for the proposition that "the costs of notice [must] be paid by plaintiff" and that the Supreme Court "made no exception to this rule if liability was established." (Def.'s Opp to Notice Motion, p.5.) This reading overstates the Supreme Court's holding. The district order in that case that imposed costs on defendant followed a "preliminary hearing." *Eisen*, 417 U.S. at 177. The court rejected the propriety of such a hearing, writing that not only was there "nothing in either the language or history of Rule 23 that gives a court any authority" to conduct such an inquiry, but that "such a procedure contravenes the Rule." *Id.* The

Court criticized the fact that a preliminary hearing allowed a plaintiff "to secure the benefits of a class action without first satisfying the requirements for it." *Id.* In addition, such a procedure creates the risk of "substantial prejudice to a defendant" of holding a hearing without "the traditional rules and procedures available to civil trials." *Id.* At 177-178. As noted above, the grounds on which the court rejected the order are not present in the current case; summary judgment is authorized by Rule 56 and inflicts no prejudice on a defendant.

Second, Defendant argues that the "liability in this case is not yet established and will not be established until the Court of Appeals for the Ninth Circuit established binding precedent" on the statutory interpretation of the FDCPA. (Def's Opp. To Notice Motion, p. 1.) On the contrary, Rule 56 empowers this Court to grant summary judgment when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In addition a summary judgment "may be rendered on the issue of liability." *Id.* In the absence of precedent from the Ninth Circuit, the Court reached its conclusion in granting partial summary judgment by examining two district court cases from this district and undertaking extensive analysis of the legislative history of the FDCPA. The Court's Summary Judgment Order establishes Defendant's liability.

Third, Defendant claims the standard of appellate review for a question of law renders the Court's conclusions uncertain. The findings of liability in *Kyriazi* and *Meadows* that preceded the order that defendant's pay notice costs were based on factual findings that the defendants' conduct violated the law. Such findings receive appellate review under

an abuse of discretion standard, and, as defendant correctly states, the Ninth Circuit would review *de novo* the court's finding of defendant's liability as a matter of law. However, while the standard of appellate review may influence defendant's chances of success on appeal, it does not undermine the finality of this court's summary judgment. FN6

Because the Court has issued a final ruling finding Defendant liable, Plaintiffs will prevail on their claims. Accordingly, this factor weighs in favor of Defendant bearing the cost of the notice.

Having shown the certainty of Plaintiffs' success on the merits, the Court now turns to the other *Berland* factors: the Defendant's desire to take advantage of the *res judicata* effect of the class action, the number of named plaintiffs and their financial responsibility, the named plaintiffs' interests compared with the entire class, and their ability to pay considering the cost of the notice. On the current record, the court cannot determine the extent of Defendant's desire to take advantage of the res judicata effect of the class action. The other *Berland* factors support an order that Defendant pay for the cost of notice. The named Plaintiffs received demands for total interest payments of $37.69. (Summary judgment order, at p.3.) This amount constitutes only a fraction of the over $260,374.76 that Defendant

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6. In fact, this court has already expressed confidence in its ruling. In denying defendant's motion for certification for immediate appeal of the issue of liability under the FDCPA, the court wrote that "there is no substantial ground for difference of opinion." (Summary judgment order, p. 18.)

characterizes as interest. The Plaintiffs have a small absolute stake in the class action, and their claims are minuscule compared with the cumulative claims of the class. The overall estimated cost of notice is a substantial $22,341. Therefore, ordering Plaintiffs to pay the cost of notice on Plaintiffs would impose a burden out of proportion to their personal stakes in the lawsuit. These factors, while not dispositive, support a decision to order Defendant to bear the cost of sending notice to class members.

The *Berland* factors weigh in favor of Defendant bearing the costs, and the Court has already made a final decision on the merits of Plaintiffs' claim. It would be unreasonable to order Plaintiffs to pay the cost of notice when the Court has already found Defendant liable. FN7

CONCLUSION

Because the current class certification is overbroad in its allocation of class members into the 123(b)(3) subclass, the court modifies the class certification as follows:

1. Named plaintiffs Castillo and Hunt are **certified** as the representatives of the class defined as follows: all persons to whom Defendant mailed a collection demand at any time since December 5, 2004, (1) which included a demand for both interest and a statutory service charge on a dishonored check; (2) where the check was written in the State of California for personal, family, or household

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7. Defendant argues that it is unable to pay the notice costs and that the court should therefore refrain from imposing costs. Defendant's ability to pay is not a relevant factor in deciding the motions before the court.

purposes; and (3) whose mail was not returned as undeliverable. FN8

2. It is **further ordered** that the issues of liability, declaratory relief, and statutory damages under the FDCPA for those class members who did not pay any portion of the *interest* demanded is **certified** under Rule 23(b)(2).

3. It is **further ordered** that the issues of actual damages under the FDCPA for those class members who paid any portion of the *interest* demanded is **certified** under rule 23(b)(3).

The court **orders** Plaintiffs to send notice, by first class mail, to all class members who paid any portion of the demanded interest. The language in the notice must conform to that in the exhibit that Plaintiffs submitted with their motion. The Court **orders** Plaintiff to account for the actual cost of producing and sending the notices, and the court **orders** Defendant to pay the cost of producing and sending the notices.

It is so ordered.

Dated: July 25, 2007

/s/ Martin J. Jenkins
MARTIN J. JENKINS
UNITED STATES DISTRICT JUDGE

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8. This certification of the class as a whole is unchanged.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

HUNT,

PLAINTIFF,

V.

CHECK RECOVERY SYSTEMS, INC.,

DEFENDANT.
_____/

NO. C05-04993 MJJ
NO. C06-02037 MJJ

ORDER GRANTING PLAINTIFF'S MOTION TO CERTIFY CLASS

INTRODUCTION

Before the Court is Plaintiff's Brandy Hunt ("Hunt") and Brian Castillo's (Castillo")(collectively, "Plaintiffs") Motion to Certify Class. FN1 Defendant Imperial Merchant Services d.b.a. Check Recovery Systems ("Defendant" or "Imperial") opposes the motion. For the following reasons, the Court **grants** Plaintiffs' Motion to Certify Class.

FACTUAL BACKGROUND

A. PROCEDURAL HISTORY

Hunt and Castillo filed their complaints on December 5, 2005 and March 16, 2006, respectively. On May 9, 2006, this Court issued a related case

1. Docket no. 45, filed September 19, 2006

Order relating Plaintiff's cases. Both Plaintiff's seek damages under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et. Seq.* ("FDCPA"). Plaintiffs allege that Imperial's practice of including an interest charge, in addition to their attempt to collect both a check amount and a statutory service charge violates the FDCPA. In particular, Plaintiffs allege that Defendant's debt collection practices: (1) use false, deceptive or misleading representations in violation of § 1692e; (2) falsely represent the character, amount, or legal status of the debt in violation of § 1692e(2)(a); (3) use unfair or unconscionable means to collect or attempt to collect the debt in violation of §1692f; and (4) exceed the amount expressly permitted by law in violation of §1692f(1). Plaintiff's now seek class certification, to create a class of similarly situated Plaintiffs, pursuant to Federal Rules of Civil Procedure 23(a) and 23(b).

On behalf of the class, Plaintiffs seek the following forms of relief: (1) declaratory judgment that Defendant's practices violate the FDCPA; (2) actual damages pursuant to §1692k; (3) statutory damages pursuant to §1692k; and (4) costs and reasonable attorney fees pursuant to §1692k.

B. The Parties

On July 5, 2004, Hunt wrote a check in the amount of $137.15 to Pack 'n Save. (Joint statement of Undisputed Fact ("JSUF") ¶2.) On November 28, 2004, Castillo wrote a check in the amount of $276.36 to Pak 'n Save. (*Id.* ¶1.) Both checks were written for personal, family, or household purposes, and both checks returned unpaid due to insufficient funds. (*Id.* ¶¶1-2, 5.) Pak 'n Save is operated by Safeway, Inc. ("Safeway"). (*Id.* ¶3.) After the Castillo and Hunt checks were returned unpaid, Safeway referred the

checks to Imperial for collection. (*Id.* ¶4.) The parties agree that Imperial's debt collection conduct is governed by the FDCPA. (*Id.* ¶5.)

C. Defendant's Debt Collection Practices

The principal purpose of Imperial is to collect debts. (*Id.* ¶5.) When Safeway refers unpaid checks written in California to Imperial, Safeway asks Imperial to collect the check amount and the service charge provided under California Civil Code §1719. (*Id.* ¶6.) Imperial retains 27% of the amount collected for the check and the statutory service charge. (*Id.*) Imperial retains 100% of the interest that it collects.(*id.*) Safeway and Imperial followed these practices in connection with the Hunt and Castillo checks (*id.*)

1. CASTILLO'S CHECK

Safeway referred the Castillo check to Imperial to collect the check amount plus a $25.00 statutory service charge. (*id.* ¶7.) Imperial mailed Castillo a collection letter, dated March 17, 2005 in which Imperial demanded $276.36 for the check amount, $25.00 as a "Misc." charge, and $8.99 as interest. (*Id.*) Subsequently, Imperial mailed Castillo a collection letter, dated December 2, 2005, in which Imperial demanded $276.36 for the check amount, 425.00 as a "Misc." charge, and $30.43 as interest. (*Id.*)

2. HUNT'S CHECK

Safeway referred the Hunt check to Imperial to collect the check amount plus a $35.00 statutory service charge. (*Id.* ¶8.) Subsequently, Imperial mailed Hunt two collection demands. (*Id.*) The second demand, dated December 6, 2005, includes a demand for the check amount, a "Misc." charge of $35.00, and interest of $67.26, for a total of $179.41.

D. PROPOSED DEFINITION OF THE CLASS

Plaintiffs define the proposed class as follows:

> All persons to whom defendant mailed a collection demand at any time since December 5, 2004, (1) which included a demand for both interest and a statutory service charge on as dishonored check; (2) where the check was written in the State of California for personal, family or household purposes; and (3) whose mail was not returned as undeliverable.

(Plaintiffs' Motion for Class Certification ("Mot. For Cert.")2.)

LEGAL STANDARD

Rule 23 of the Federal Rules of Civil Procedure outlines a two-step process for determining whether class certification is appropriate. First, Rule 23(a) sets forth four conjunctive prerequisites that must be met for any class:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a); *see also Hanon v. Data Products Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). These four requirements are often referred to as numerosity, commonality, typicality, and adequacy. *See General Tel. Co. v. Falcon*, 457 U.S. 147, 156 (1982); *In Re Adobe Sys., Inc. Sec. Litig.*, 139 F.R.D. 150, 153 (N.D. Cal. 1991).

Second, assuming the requirements of

subdivision (a) are satisfied, the party seeking class certification must also demonstrate that the action is maintainable by falling within one of the three kinds of actions permitted under Rule 32(b). *See* Fed.R.Civ.P. 23(b); *In Re Adobe Sys.*, 139 F.R.D. at 153. Specifically, the Plaintiffs must demonstrate their claim is proper under Rule 23(b)(1), (b)(2), or (b)(3).

An action is maintainable under Rule 23(b)(1) when there is either "a risk of prejudice from separate actions establishing incompatible standards of conduct" or the judgment in an individual lawsuit might adversely impact other class members. *See generally* Hon. William W. Schwarzer, *Federal Civil Procedure Before Trial* §10.385 (2006). This particular type of class action does not permit the recovery of damages. *See Alpert v. U. S. Industries, Inc.*, 59 F.R.D. 491, 499 (C.D. Cal. 1973).

An action is maintainable under Rule 23(b)(2) if the defendant "has acted (or refused to act) in a manner applicable to the class generally, thereby making injunctive or declaratory relief appropriate with respect to the class as a whole." Schwarzer, *supra*, §10.298-406. Rule 23(b)(2) actions are common where injunctive or declaratory relief is the primary relief sought on behalf of the class. *See Id.* Recovery of damages is generally not available in a Rule 23(b)(2) class action. *See Molski v. Gleich*, 318 F.3d 937, 949-50 (9th Cir. 2003). The Ninth Circuit has required a careful consideration of the facts of each case to ensure that a class certified under Rule 23(b)(2) is primarily seeking injunctive relief. *See id.*

Finally, an action is proper under Rule 23(b)(3) if questions of law or fact common to the class "predominate" over questions affecting the individual members, and the court determines that a class

action is superior to other methods available for adjudicating the controversy. *See* Fed.R.Civ.P. 23(b)(3). Recovery of damages is available under Rule 23(b)(3). *See* Schwarzer, *supra*, §10:420-479. If a class is certified under Rule 23(b)(3), all absent class members must be notified of the action and informed of their right to "opt-out" of the litigation. *Id.*

In analyzing whether the putative class meets the requirements of Rule 23, a court is to take the substantive allegations of the complaint as true, and may also consider extrinsic evidence submitted by the parties. *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975). Moreover, "[i]n determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 178 (1974)(quoting *Miller v. Mackey Int'l*, 452 F.2d 424, 427 (5th Cir 1971)). Nevertheless, the plaintiffs bear the burden of establishing each of the required elements for class certification. *See id.* At 617 (citing *In re Northern Dist. Of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2D 847, 854 (9th Cir. 1982)).

ANALYSIS

I. Prerequisites of Rule 23(a)

As a preliminary matter, Defendant argues that Plaintiffs lack standing to bring this class action. Specifically, Defendant purports that Hunt and Castillo have discharged their debt to Defendants in a prior bankruptcy proceeding and, thus, Plaintiffs sustained no injury from Defendant's alleged unlawful acts.

The Court finds this argument unavailing. The conduct being litigated here is in the alleged unlawful collection of interest by Defendant from

Plaintiffs, and others similarly situated. In other words, the injury occurred upon Defendant's demand for interest on the dishonored checks. Plaintiff's ability to sue Defendant for unlawful collection of interest under the FDCPA does not rest on Plaintiffs actually incurring debt as a result of Defendant's conduct. "The [FDCPA] is designed to protect consumers from the abusive, deceptive and unfair debt collection practices of unscrupulous debt collectors, regardless of whether a valid debt actually exists." *Borcherding-Dittloff v. Transworld "Sys., Inc.*, 185 F.R.D. 558, 564, (W.D. Wis 1999)(citing *Baker v. G.C. Serv. Corp.*, 677 F2d 775, 777 (9th Cir. 1982)). Therefore, Plaintiffs have standing to sue and the Court will now determine if class certification is appropriate. FN2

A. NUMEROSITY

Plaintiffs assert that the class is sufficiently numerous because Defendant mailed out thousands of collection letters demanding both interest and a statutory fee. Defendant conditionally concedes the

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2. Defendant admits that Plaintiffs meet all prerequisites of Rule 23(a) in the event that this Court finds that Plaintiffs have standing to bring this action. (*See* Dec. Of Arons, Ex. 2.) The Court finds that Plaintiffs do have standing, creating a situation where class certification pursuant to Rule 23(a) is essentially unopposed. However, in the interest of justice, the Court will review all the necessary requirements under Rule 23 to ensure that class certification is appropriate. *See General Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982)(stating that a class may only be certified if the court is "satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.")

issue of numerosity based on the Court's finding that Plaintiffs have standing to sue.

Under Rule 23(a), the class must be "so numerous that joinder of all members is impracticable." Fed.R.Civ.P. 23(a)(1); *Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir. 2003). However, there must be a "statement of basic facts. Mere repetition of the language of the Rule is inadequate. *Gillibeau v. Richmond*, 417 F.2d 416, 432 (9th Cir. 1969).

Here, Plaintiffs make a "statement of basic facts" and show that the class is sufficiently numerous. Plaintiffs allege that Defendants mailed 67,108 collection letters for 43,536 checks referred to Defendants between November 2004 and May 2006. Plaintiffs' allegations show that the potential class is "so numerous that joinder of all members is impracticable."

B. Commonality

Plaintiffs rely on the fact that Defendant mailed form collection letters demanding interest. Defendant does not contest the mailing or contents of the collection letters.

"A class has sufficient commonality 'if there are questions of fact and law which are common to the class'" *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir., 1988)(quoting Fed.R.Civ.P. 23(a)(2)). The Northern District has interpreted that to mean that commonality typically manifests "where... the defendants have engaged in standardized conduct towards members of the proposed class by mailing to them allegedly illegal form letters." *Palmer v. Stassinos*, 233 F.R.D. 546, 549 (N.D. Cal. 2006)(quoting *Keele v. Wexler*, 149 F.3d 4589,594 (7th Cir,. 1988)).

Here, Defendant allegedly committed the same

"standardized conduct found in *Palmer*. Defendant allegedly sent out form letters demanding Plaintiffs to pay statutory fees for dishonored checks as well as interest on the owed money. Defendants targeted this conduct to all Plaintiffs in the putative class, in the same manner. Based on Defendant's alleged standardized conduct, this Court concludes that common questions of law exist as to whether Defendant's conduct was unlawful.

C. Typicality

For Typicality, Plaintiffs rely on a similar argument as they did for commonality. Specifically, that typical claims amongst all potential class members exist because Defendant sent unlawful form collection letters to Plaintiffs.

The typicality requirement serves to "assure that the interest of the named representative aligns with the interests of the class." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). Typicality refers to the nature of the claim or defense of the class representative and not on facts surrounding the claim or defense. *Id.* The burden imposed by the typicality requirement is not great. *See Hanlon*, 150 F.3d at 1020. In fact, the Ninth Circuit has noted that "the commonality and typicality requirements of Rule 23(a) tend to merge." *Staton*, 327 F.3d at 957. [A] plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *Keele*, 149 F.3d at 595 (internal citations omitted).

Here, Plaintiffs share one legal theory with the rest of the class. Plaintiffs are suing Defendant under the FDCPA, alleging that defendant engaged in unlawful standardized conduct towards Plaintiffs.

Defendant's argument that Plaintiffs are only typical of a putative class that "have written dishonored check[s], paid no interest, and then discharged their debt in bankruptcy" is not only incorrect, but immaterial for atypicality analysis. (Defendant's Motion in Opposition to Plaintiff's Motion for Class Certification, 11:21-23.) "Typicality refers to the nature of the claim or defense of the class representative, and not the specific facts from which it arose or the relief sought. *Abels v. JBC Legal Group, P.C.*, 227 F.R.D. 541, 545 (N.D. CAL. 2005)(quoting *Hanon*, 976 F.2d at 508.) Factual variations among class members' grievances do not defeat a class action. *Keele,* 149 F.3d at 594 (citing *Patterson v. General Motors Corp.*, 631 F.2d 476, 481 (7th Cir. 1980)); *see also Irwin v. Mascott*, 96 F. Supp. 2d 968, 977 (N.D.Cal. 1999)(stating the fact that named plaintiffs may have a right to statutory damages, injunctive relief and declaratory relief, but not a right to actual damages, does not render their clams atypical). Accordingly, the typicality requirement is satisfied.

D. Adequacy

Plaintiffs rely on their declarations, and those of their counsel, to satisfy the adequacy requirement. Plaintiffs allege no potential conflict of interest between them and the rest of the proposed class. Defendant contends that there is a conflict of interest between the Plaintiffs and the putative class because Plaintiffs discharged their debts in previous bankruptcy proceedings.

The Federal Rules require that "the representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). This requires the Court to ask two questions:"(1) Do the representative plaintiffs and

their counsel have any conflicts of interest with other class members, and (2) will the representative plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Staton*, 327 F.3d at 957; *see also* Fed.R.Civ.P. 23(g)(1)(B)(stating that "class counsel must fairly and adequately represent the interests of the class.").

Here, Defendant argues that since Plaintiffs discharged their debts to Defendant through bankruptcy proceedings, Plaintiffs have a conflict of interest with respect to the rest of the class. The Court finds this argument unconvincing. Discharging one's debt may ultimately effect the collection of damages, but it does not conflict with the legal merits of the claim with respect to class members who did not discharge their debt. Based on the record before the Court, the only conflict between Plaintiffs and any potential class member could be a difference in the amount of recovery. FN3 However, a potential difference in recovery does not, in itself, create a conflict of interest. *See, e.g. Palmer*, 233 F.R.D. at

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3. Named plaintiffs in FDCPA class actions would be entitled to up to $1,000 in statutory damages. 15 U.S.C §1692k(a)(2)(B)(i). Unnamed class members would be entitled to share statutory damages of up to 1 percent of Defendant's net worth. 15 U.S.C. §1692K(a)(2)B)(ii). Each class member would be entitled to any actual damages. 15 U.S.C. §1692k(a)(1).

551. Additionally, any financial incentive in Plaintiffs or class counsel will likely lead them to "prosecute the action vigorously." FN4

Accordingly, Plaintiffs and their counsel have no conflict with potential class members and Plaintiffs' counsel has extensive experience in FDCPA class actions. Notwithstanding Defendant's concern with Plaintiffs' bankruptcy status, Plaintiffs satisfy the adequacy requirements.

II. Whether Certification is Appropriate Under Rule 23(b)(2) or Rule 23(b)(3)

To be certified, a class must also satisfy the criteria of one of the three subsections of Rule 23(b). Plaintiffs request class certification pursuant to Rule 23(b)(2), or in the alternative, a hybrid class pursuant to Rule 23(b)(2) and (3). Defendant argues that certification under Rule 23(b)(2) would be improper by arguing that the FDCPA does not allow a private plaintiff to obtain equitable relief. Defendant argues that certification under Rule 23(b)(3) would be improper because common questions of law and fact do not predominate and because a class action is not superior to alternative methods of adjudication of the controversy. As fully explained below, the Court finds that certification under Rule 23(b)(2) is appropriate on the issues of liability, declaratory relief, and statutory damages, and that certification under Rule 23(b)(3) is appropriate on the issue of actual damages.

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4. Plaintiffs Counsel, Arons, Wilcox, and Bragg have been involved in many FDCPA class actions in this District and in other courts. *See generally Palmer*, 233 F.R.D. 546 (N.D.Cal. 2006); *Schwarm v. Craighead*, 233 F.R.D. 655 (E.D. Cal. 2006); *Irwin v. Mascott*, 96 F. Supp. 2d 968 (N.D.CAL. 1999).

A. Rule 23(b)(2)

Plaintiff's primary request is for the entire class to be certified pursuant to Rule 23(b)(2). Defendant argues that certification on these grounds is improper because Plaintiffs' claims for declaratory and injunctive relief are not available under the FDCPA and not appropriate for class certification under Rule 23(b)(2).

A class may be certified under Rule 23(B)(2) if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed.R.Civ.P. 23(b)(2). Rule 23(b)(2) generally does not extend to cases in which the appropriate final relief relates primarily to money damages. *See Arnold v. United Artists Theatre Circuit, Inc.*, 148 F.R.D. 439, 450-51 (N.D. Cal. 1994)(citing Rules Advisory Committee Notes to 1966 Amendments to Rule 23, reprinted at 39 F.R.D. 69, 102 (1966)); *see also Molski*, 318 F.3d at 949-50. The Ninth Circuit has required a careful consideration of the facts of each case to ensure that a class certified under rule 23(b)(2) is primarily seeking injunctive relief. *See id.*

However, class actions certified under Rule 23(b)(2) are not limited to actions requesting injunctive and declaratory relief, but may include cases that also seek monetary damages where the money damages are "merely incidental." *Probe v. State Teachers' Retirement Sys.*, 780 F.2d 776, 780 (9th Cir. 1986), *cert. denied*, 476 U.S. 1170 (1986). "Incidental" means that the monetary damages "flow directly from liability to the class as a whole on the claims forming the basis of the .. declaratory relief." *Swanson v. Mid Am, Inc.*, 186 F.R.D. 665 (M.D. Fla.

1999)(citing *Alison v. Citgo Petroleum Corp.*, 151 F. 3d 402, 413 (5th Cir. 1998). More specifically, FDCPA class actions certified under Rule 23(b)(2) are also not limited to actions requesting injunctive and declaratory relief. *Ballard v. Equifax Check Services, Inc.*, 186 F.R.D. 589, 596-97 (E.D. Cal.1999) (certifying FDCPA class under Rule 23(b)(2) on the issues of liability, declaratory relief, and statutory damages but reserving certification of actual damages for certification under Rule 23(b)(3)); *Gonzales v. Arrow Fin. Services, LLC*, 233 F.R.D. 577 (S.D. Cal. 2006)(certifying FDCPA class under Rule 23(b)(2) where plaintiffs received standardized demand letters and sought declaratory relief and statutory damages); *Borcherding-Dittloff*, 185 F.R.D. at 565-66 (certifying class under Rule 23(b)(2) for claims under FDCPA where plaintiffs sought declaratory relief and statutory damages); *Gammon v. GC Services Ltd. P'ship*, 162 F.R.D. 313, 319-22 (1995)(certifying class under Rule 23(b)(2) for claims under FDCPA seeking declaratory relief and statutory damages); *Swanson v. mid Am, Inc.*, 186 F.R.D. 665 (M.D. Fla. 1990)(same).

Here, Plaintiffs' request for statutory damages is secondary to their primary claim of declaratory relief for three reasons. First, the declaratory relief requested will affect more persons and have consequences over a greater period of time than monetary damages. *See Ballard*, 186 F.R.D. at 596. These claims will affect not only those class members who received Defendant's demand letters who may be entitled to statutory damages, but also those class members who received the demand letters and then subsequently incurred additional actual

damages FN5 by paying the alleged illegally demanded amounts. The principal criteria guiding the policy in favor of rendering declaratory judgments are (1) when the judgment will serve a useful purpose in clarifying and setting of legal relations between the parties, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. *Gammon*, 162 F.R.D. at 320; *see also Guerra v. Sutton*, 783 F.2d 1371, 1376 (9th Cir. 1986); Schwarzer, *supra* at ¶10:5. In the instant case, a declaratory judgment would settle the issue of the legality of Defendant's behavior with respect to the entire class. Given that the very purpose of class actions is to promote judicial efficiency and economy, the Court finds that Plaintiff's request for declaratory judgment to be appropriate. *See Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 149 (1982).

Second, the Court notes that Plaintiffs' money damages, and those of the putative class, all flow directly from demand letters sent by Defendant and are therefore secondary to the claim for declaratory relief. *See, e.g. Borcherding-Dittloff*, 185 F.R.D. at 566 (stating "[c]ourts have found requests for declaratory relief to predominate over requests for monetary relief where the award of damages flows directly from the declaratory relief and where damages are easily calculated by a formula that is uniformly applicable to the class")(citing *Rice v. City of Philadelphia*, 66 F.R.D. 17, 20 (E.D. Pa. 1974)). Here, because Plaintiffs request statutory damages and declaratory relief arise from Defendant's

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5. The inquiry regarding actual damages is more appropriate as a class under Rule 23(b)(3) as discussed below.

repeated violation of the FDCPA, the resulting statutory damages flow directly from Defendant's underlying FDCPA liability. The calculation of statutory damages will be a mechanical task and is therefore readily calculable for the entire class. *See* 15 U.S.C ¶1692k(a)(2)(B).

Third, the statutory damages for each class member is comparatively nominal. As the court noted in *Gammon*, because the FDCPA caps the maximum award at $500,000 or 1 percent of the of the net worth of the debt collector, each class member would receive a nominal amount. *See Gammon*, 162 F.R.D. at 320. As a result, the court concluded that the plaintiff's request for declaratory relief predominated over the request for monetary relief. *See id.* Similarly, the proposed class here results from 67,108 demand letters between November, 2004 and May 2006 based on a total of 43,536 checks referred. Since Defendant's net worth is approximately $456,151, FN6 the maximum amount of recovery for each class member would approximately be between 7 cents and 10 cents. The Court find this amount to be de minimus and not sufficient to sustain Defendant's arguments that Rule 23(b)(2) certification is inappropriate.

B. Rule 23(b)(3)

In the event that this court does not certify the entire class under Rule 23(b)(2), Plaintiffs alternatively seek to certify the issue of actual

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6. Defendant states that its net worth has not yet been established. However, Defendant's balance sheet on its Federal 1120S Income Tax Return, provided in discovery, shows a net worth of 4456,151.00. (Defendant's Motion in Opposition to Plaintiff's Motion for Class Certification, 16:1-4.)

damages pursuant to Rule 23(b)(3). Defendant relies on the *Palmer* case, 233 F.R.D. 546, and argues that common questions of law and fact do not predominate, and that a class action is not superior to alternative methods of adjudication of the controversy.

Class certification pursuant to Rule 23(b)(3) requires a determination that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other methods for the fair and efficient adjudication of the controversy." Fed.R.Civ.P. 23(b)(3). The Court now turns to the issues of predominance and superiority.

1. Predominance

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Hanlon*, 150 F.3d at 1022 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997)). "Rule 23(b)(3) focuses on the relationship between the common and individual issues. 'When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis.'" *Id.* (quoting 7A Charles Alan Wright, *et. al., Federal Practice & Procedure* ¶1778 (2d ed. 1986)). The primary and predominating question in this case is whether Defendant's conduct in demanding statutory changes, in addition to the debt amount and interest, was contrary to California law and therefore in violation of the FDCPA. As to actual damages, the question will be how much

actual damage was sustained by each class member. 15 U.S.C. 1692k(a)(1).

Here, the legal issues arising from Defendant's demand letters are the same for each class member. As Plaintiffs correctly point out, the only individual issues are ministerial, *e.g.* identifying class members and calculating actual damages. Plaintiffs explain that the calculation of actual damages will require individualized issues of proof, because the amounts collected will be reflected in Defendant's collection records. Defendant does not substantively respond to Plaintiff's arguments on predominance and does not present availing arguments regarding any individualized issues. As a result, the Court finds that the predominant common questions in this case present a clear justification for handling the dispute on a representative rather than on an individualized basis.

2. Superiority

Plaintiffs argue that a class action is superior in this context because putative class members would not ordinarily file individualized actions. In particular, Plaintiffs contend that most putative class members would not be aware of their rights and would not have the time and resources to locate knowledgeable counsel willing to represent them. Defendant counters that an individualized action, seeking $1,000 in statutory damages, accompanied by a claim under ¶17200 of the California Business and Professions Code for disgorgement of profits is the superior method of adjudicating this case.

In determining superiority of a class action to individual litigation, courts consider the interests of the individual members in controlling their own litigation, the desirability of concentrating the litigation in the particular forum, and the

manageability of the class action. Fed.R.Civ.P. 23(b)(3); *see also Amchem Prods., Inc.*, 521 U.S. at 615. In determining whether a class action may be superior to individual litigation, the Court notes that the FDCPA specifically provides for and contemplates class action relief. 15 U.S.C. §§1692k(a)(2)(B), (b)(2). Courts have found that individual consumers are most likely unaware of their rights under the FDCPA. *Ballard*, 186 F.R.D. at 600. Moreover, class action certifications to enforce compliance with consumer protection laws are desirable and should be encouraged." *Id.* (citing *Duran v. Credit Bureau of Yuma, Inc.*, 93 F.R.D. 607, 610 (D. Ariz. 1982) (citing *Watkins v. Simmons and Clark, Inc.*, 618 F.2d 398, 404 (6th Cir. 1980))).

Here, the Court finds that a class action in this context is superior to individual claims. First, the Court agrees that individual consumers are most likely unaware of their rights under the FDCPA and that the likelihood of individual actions is remote. *See Ballard*, 186 F.R.D. at 600. Second, the drafters of the FDCPA contemplated class action recovery within the liability portion of the act. Third, the size of any individual damages claims under the FDCPA are usually so small that there is little incentive to sue individually. *See id.* (citing *Amchem Prods., Inc.*, 521 U.S. At 615). Fourth, efficiency and consistency of concerns favor litigating the legality of Defendant's standardized conduct by all class members in one suit, rather than forcing each class member to sue individually. *Id.* (citing *Scholes v. Stone, McGuire & Benjamin*, 143 F.R.D. 181, 188-89 (N.D. Ill. 1992)). Finally, as was the case in *Ballard*, while valid concerns regarding the manageability of the class exist in relation to liability, they are not sufficient to defeat certification. Manageability is not a separate

area of inquiry in considering certification under Rule 23(b)(3), but merely a secondary problem to consider. *Id.* (citing *Gulish v. United States*, 78 F.R.D. 515, 518 (W.D. Pa. 1978)). The more important considerations are the predominance of common questions and superiority of the class action. *Id.* "Manageability problems must be factual, unavoidable obstacles to the litigation before they can be considered obstacles to class certification." *Id.* (citation omitted). Accordingly, the Court finds certification of the issue of actual damages is proper under Rule 23(b)(3).

CONCLUSION

1. For the foregoing reasons, the Court **GRANTS** Plaintiffs' Motion to Certify the Class. Named Plaintiffs Castillo and Hunt are **CERTIFIED** as the representatives of the class defined as follows: All persons to whom Defendant mailed a collection demand at any time since December 5, 2004, (1) which included a demand for both interest and a statutory service charge or a dishonored check; (2) where the check was written in the State of California for personal, family or household purposes; and (3) whose mail was not returned as undeliverable.

2. It is **FURTHER ORDERED** that the issues of liability, declaratory relief, and statutory damages under the FDCPA for those class members who did not pay any portion of the statutory service charge demanded is **CERTIFIED** under Rule 23(b)(2).

3. It is **FURTHER ORDERED** that the issues of actual damages under the FDCPA for those class members who paid any portion of the statutory service charge demanded is **CERTIFIED** under rule 23(b)(3).

IT IS SO ORDERED.

Dated: March 20, 2007

/s/ Martin J. Jenkins
MARTIN J. JENKINS,
UNITED STATES DISTRICT JUDGE